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UNITED STATES REPORTS

VOLUME 287

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1932

FROM OCTOBER 3, 1932, TO AND
INCLUDING (IN PART) JANUARY 9, 1933

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS[1]

CHARLES EVANS HUGHES, Chief Justice.
WILLIS VAN DEVANTER, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
HARLAN FISKE STONE, Associate Justice.
OWEN J. ROBERTS, Associate Justice.
BENJAMIN N. CARDOZO, Associate Justice.

WILLIAM D. MITCHELL, Attorney General.
THOMAS D. THACHER, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

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[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see next page.

135431

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, Louis Dembitz Brandeis, Associate Justice.

For the Second Circuit, Harlan Fiske Stone, Associate Justice.

For the Third Circuit, Owen J. Roberts, Associate Justice.

For the Fourth Circuit, Charles Evans Hughes, Chief Justice.

For the Fifth Circuit, Benjamin N. Cardozo, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

For the Seventh Circuit, Willis Van Devanter, Associate Justice.

For the Eighth Circuit, Pierce Butler, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

For the Tenth Circuit, Willis Van Devanter, Associate Justice.

March 28, 1932.

TABLE OF CASES REPORTED

Page.

Abraham & Straus *v.* Art Metal Works..... 657
Acme Operating Corp., United States *v*..... 588
Adams *v.* Osage Tribe 652
Adams *v.* United States..... 652
Aderhold, Miller *v* 592
Advance-Rumely Thresher Co. *v.* Jackson..... 283
Aero Mayflower Transit Co. *v.* Conway..... 671
Aetna Life Ins. Co. *v.* Moses..... 530, 582
Alabama, Patterson *v*..... 45
Alabama, Powell *v*..... 45
Alabama, Weems *v*..... 45
Alabama State Bridge Corp., K. C. Bridge Co. *v*..... 644
Alexander, Healdton Oil & Gas Co. *v*..... 636
Allen, Doolittle *v* 671
Allen (Charles M.) & Son, Blue Diamond Co. *v*..... 615
Alpha Portland Cement Co. *v.* Burnet..... 624
Alpine Forwarding Co., Pennsylvania R. Co. *v*..... 647
A. L. Smith Iron Works; George A. Ohl & Co. *v*..... 586
Altemus *v.* Talmadge..... 614
Alton R. Co. *v.* United States..... 229
Aluminum Goods Mfg. Co., Burnet *v*..... 544, 583
American Airways *v.* Wallace..... 565
American Automobile Ins. Co. *v.* Benedetto..... 621
American Factors, Isenberg *v*..... 654
American Factors, Sielcken-Schwarz *v*..... 654
American Falls Reservoir Dist. No. 2, Twin Falls Canal Co. *v*..... 638
American Import & E. Co., Lafontan *v*..... 664
American Printing Ink Co. *v.* Navigazione Libera Triestina..... 653

Page.
American Surety Co. *v.* Baldwin 156
American Surety Co., Baldwin *v* 156
American Surety Co. *v.* Marotta 513, 582
American Surety Co. *v.* Santa Barbara 616
American Viscose Corp. *v.* Commissioner 615
Anderson *v.* Wilson 592
Anderson, Wilson *v* 592
Annapolis, Williams *v* 594
Ansardi *v.* United States 623
Ansehl, Puritan Pharmaceutical Co. *v* 666
Arkalian *v.* United States 643
Arkansas Natural Gas Co., McCoy *v* 661
Arkwright *v.* Gonser 672
Arthur C. Harvey Co. *v.* Malley 596
Art Metal Works, Abraham & Straus *v* 657
Arzner, United States *v* 470, 583
Asbury Truck Co. *v.* Railroad Comm'n 570
Atchison, T. & S. F. Ry. Co. *v.* Moran 621
Atlantic City Electric Co. *v.* Commissioner 582
Atlantic Coast Line R. Co. *v.* Ford 502
Atlantic Life Ins. Co., Hutto *v* 622
Atlantic Life Ins. Co. *v.* Pharr 647
Babcock *v.* Chicago Railways Co 614
Bainbridge *v.* Merchants & Miners Transp. Co .. 278, 581
Baker, Baltimore & O. R. Co. *v* 610
Baldwin *v.* American Surety Co 156
Baldwin, American Surety Co. *v* 156
Baldwin, Newtown Creek Towing Co. *v* 620
Baldwin, Texas & Pac. Ry. Co. *v* 606
Baltimore, Williams *v* 594
Baltimore Insular Line, Cortes *v* 367
Baltimore & Ohio R. Co. *v.* Baker 610
Baltimore & Ohio R. Co. *v.* Brady 596
Bankers Pocahontas Coal Co. *v.* Burnet 308, 584
Bank of Commerce & Trust Co., Brown *v* 563
Banning *v.* Hartman Furniture & C. Co 659
Banning, Hartman Furniture & C. Co. *v* 659

Page.
Bartlesville Zinc Co. *v.* Mills..... 602
Bassinger, U. S. Fidelity & G. Co. *v*..... 622
Becker County, Shevlin Land Co. *v*..... 655
Beebe *v.* Mooremack Gulf Lines..... 597
Bender, Palmer *v*..... 551, 586
Benedetto, American Automobile Ins. Co. *v*..... 621
Bennett, Cotton *v*..... 646
Bennett, S. S. Kresge Co. *v*..... 565
Berg *v.* Iowa..... 598
Berk, Tamiami Investment Co. *v*..... 611
Berl *v.* Crutcher..... 670
Berlin *v.* Commissioner..... 642
Bernstein, Speakman *v*..... 639
Bevan *v.* Light..... 665
Biggs *v.* Missouri Pac. R. Co..... 575
Binford, Stephenson *v*..... 251
Binkley Coal Co. *v.* Henderson..... 670
Birmingham *v.* Graves..... 669
Bistor *v.* McDonough..... 641
Blandamer *v.* United States..... 628
Bliss (E. W.) Co. *v.* United States..... 634
Blodgett, Guaranty Trust Co. *v*..... 509
Blue Diamond Co. *v.* Charles M. Allen & Son..... 615
Blumenthal *v.* Commissioner..... 662
Board of Commissioners, Indian Territory Oil Co. *v*..... 573, 594
Board of Equalization, Indian Territory Oil Co. *v*..... 573, 594
Board of Trustees *v.* United States..... 596
Boasberg *v.* United States..... 664
Boulton, Telfer *v*..... 655
Bowers, Dalton *v*..... 404
Boyd (Joseph M.) Co., Pobreslo *v*..... 518
Boynton, Moffat Tunnel Improvement Dist. *v*..... 620
Brady, Baltimore & O. R. Co. *v*..... 596
Brady *v.* Wabash Ry. Co..... 619
Brainard, Higgins *v*..... 604

Page.
Brampton Woolen Co. *v.* Field 608
Brannan *v.* Harrison 566
Brink *v.* United States 667
Britton *v.* United States 669
Brock, Mobile & Ohio R. Co. *v.* 638
Broderick, Littman *v.* 663
Brooklyn Eastern Dist. Terminal *v.* United States ... 170
Brooks, Burnet *v.* 594
Broom, Wood *v.* 1
Brown *v.* Bank of Commerce & Trust Co 563
Brown *v.* Commissioner 602
Brown *v.* Magnolia Petroleum Co 618
Brown *v.* Mayer 618
Burkis *v.* United States 655
Burnet, Alpha Portland Cement Co. *v.* 624
Burnet *v.* Aluminum Goods Mfg. Co 544, 583
Burnet, Bankers Pocahontas Coal Co. *v.* 308, 584
Burnet *v.* Brooks 594
Burnet *v.* Clark 410, 584
Burnet, Colston *v.* 640
Burnet *v.* Commonwealth Improvement Co 415
Burnet, Dickey *v.* 606
Burnet, First National Bank *v.* 636
Burnet *v.* Guggenheim 587
Burnet *v.* Harmel 103
Burnet, La Salle Cement Co. *v.* 624
Burnet, McClure *v.* 609
Burnet, Murphy Oil Co. *v.* 299
Burnet, Petroleum Exploration *v.* 592
Burnet, Sansome *v.* 667
Burnet *v.* S. & L. Bldg. Corp 593
Burnet, Strother *v.* 314
Burnet, Westmoreland Specialty Co. *v.* 609
Burns *v.* United States 216, 585
Burton, Washington Fidelity Nat. Ins. Co. *v.* 97
California *v.* General Motors Acceptance Corp 661
California, Haskell *v.* 576

Page.
California, Johnson *v*. 598
California, Leach *v*. 579
California, McClellan *v*. 611
Calmar S. S. Corp., U. S. Industrial Alcohol Co. *v*. . . 622
Cantrelle, Cherami *v*. 568
Capriola *v*. United States. 671
Carey (Philip) Mfg. Co. *v*. Dean. 623
Carpenter, Grand Trunk Western Ry. Co. *v*. 606
Carrick, Clawans *v*. 605
Catagrone *v*. United States. 574
Central Farmers Trust Co., Rorick *v*. 616
Central Florida Lumber Co. *v*. Gray. 634
Central Railroad Co. *v*. Halges. 607
Central Railroad Co. *v*. Miller. 617
Central States P. & L. Corp., U. S. Zinc Co. *v*. 660
Central Transfer Co. *v*. Terminal R. R. Ass'n. 595
Chamberlain, Pennsylvania R. Co. *v*. 589
Chandler *v*. Maine. 572
Chapman-Stein Co., Rust Engineering Co. *v*. 625
Charles Broadway Rouss *v*. First National Bank. . . . 670
Charles M. Allen & Son, Blue Diamond Co. *v*. 615
Chattanooga Finance Co., Scott *v*. 619
Cherami *v*. Cantrelle. 568
Cherami *v*. Guidroz. 563
Chesapeake & Ohio Ry. Co. *v*. Howard. 670
Chesapeake & Ohio Ry. Co. *v*. Wood. 646
Chestatee Pyrites & C. Corp., U. S. *ex rel.*, Wilbur *v*. . 588
Chicago, B. & Q. R. Co. *v*. United States. 599
Chicago Great Western R. Co. *v*. Public Service Comm'n. 641
Chicago Railways Co., Babcock *v*. 614
Chicago Railways Co., Riley *v*. 614
Chicago Railways Co., Tyler *v*. 614
Chicago, R. I. & P. Ry. Co. *v*. Matthews. 640
Chickasaw Nation *v*. United States. 643
Churchill *v*. Shell Petroleum Corp. 656
Clarion River Power Co. *v*. Smith. 639

Page.
Clark, Burnet *v*. 410, 584
Clark, Orabona *v*. 629
Clark *v*. United States. 595
Clarke *v*. Hot Springs Electric L. & P. Co. 619
Clawans *v*. Carrick 605
Clawans *v*. Whiteford. 605
Clift & Goodrich *v*. United States. 617
Colorado, Wyoming *v*. 579
Colston *v*. Burnet 640
Commissioner, American Viscose Corp. *v*. 615
Commissioner, Atlantic City Electric Co. *v*. 582
Commissioner, Bankers Pocahontas Coal Co. *v*. 584
Commissioner, Berlin *v* 642
Commissioner, Blumenthal *v*. 662
Commissioner, Brown *v* 602
Commissioner, Crile *v*. 600
Commissioner, Gann *v*. 650
Commissioner, Gwinn *v*. 224
Commissioner, Howard *v*. 619
Commissioner, Huron Bldg. Co. *v*. 632
Commissioner, Island Petroleum Co. *v*. 646
Commissioner, Keusch *v*. 641
Commissioner, Liberty National Co. *v*. 603
Commissioner, Marshall *v*. 621
Commissioner, Park *v*. 645
Commissioner, Peabody Coal Co. *v*. 605
Commissioner, Peytona Lumber Co. *v*. 612
Commissioner, Pinellas Ice & Cold Storage Co. *v*. 462, 583
Commissioner, Porter *v*. 591
Commissioner, S. A. Woods Machine Co. *v*. 613
Commissioner, Scranton Electric Co. *v*. 595
Commissioner, Strother *v*. 584
Commissioner, Swenson *v*. 618
Commissioner, Tracy *v*. 632
Commissioner, U. S. *ex rel*. Yokinen *v*. 607
Commissioner, Untermyer *v*. 647

Page.
Commissioner, Ward *v*..... 656
Commissioner, Young *v*..... 652
Commonwealth Improvement Co., Burnet *v*..... 415
Companhia de Navegacao *v.* Royal Mail Packet Co..... 607
Consolidated Indemnity & Ins. Co. *v.* W. A. Smoot & Co..... 613
Constantin, Sterling *v*..... 378
Continental Leather Co. *v.* Lamport & Holt..... 644
Continental Oil Co. *v.* Osage Oil & Rfg. Co..... 616
Conway, Aero Mayflower Transit Co. *v*..... 671
Conway, Palmolive Co. *v*..... 601
Cook, Ohio *ex rel.* Millikan *v*..... 626
Cook *v.* United States..... 581
Corporation Tax Board, Detroit Bridge Co. *v*..... 295
Corsi, U. S. *ex rel.* Stapf *v*..... 129
Cortes *v.* Baltimore Insular Line..... 367
Costanzo *v.* Tillinghast..... 341, 581
Cotter *v.* United States..... 666
Cotton *v.* Bennett..... 646
County Commissioners, Indian Territory Oil Co. *v*.. 594
County Court *v.* Maryland Casualty Co..... 653
County Court, Maryland Casualty Co. *v*..... 653
Crane *v.* United States..... 601
Crile *v.* Commissioner..... 600
Crutcher, Berl *v*..... 670
Cub Fork Coal Co., Fairmount Glass Works *v*.. 474, 585
Curtiss *v.* United States..... 648
D'Agostin *v.* United States..... 671
Dakota-Montana Oil Co., United States *v*..... 591
Dalton *v.* Bowers..... 404
Dalzell Towing Co., Sun Oil Co. *v*..... 291
Davis *v.* North Carolina..... 645, 649
Dean, Philip Carey Mfg. Co. *v*..... 623
DeLaney, Franklin *v*..... 629
Delaware, L. & W. R. Co., Kawacz *v*..... 659
Demaray, Missouri-K.-T. R. Co. *v*..... 620

Page.
Densmore *v.* United States..... 598
Denver Rock Drill Mfg. Co. *v.* United States..... 651
DeSimone, R. H. Macy & Co. *v*..... 607
Detroit Fidelity & S. Co. *v.* United States..... 633
Detroit International Bridge Co. *v.* Tax Board..... 295
Diamond Alkali Co. *v.* Heiner..... 663
Diamond Alkali Co., Heiner *v*..... 593
Diamond Alkali Co., Lewellyn *v*..... 593
Dickey *v.* Burnet..... 606
Dickson *v.* Uhlmann Grain Co..... 581
Dietrich *v.* Shipping Board..... 646
Dillon *v.* United States..... 665
District Court, Wyoming *ex rel.* Merritt Oil Corp. *v*.. 667
Docheney *v.* Pennsylvania R. Co..... 665
Dodaro *v.* United States..... 671
Donnelly *v.* Northwestern Life Ins. Co..... 638
Doolittle *v.* Allen..... 671
Dorrance *v.* Pennsylvania..... 660
Dresser *v.* United States..... 635
Dubilier Condenser Corp. *v.* Radio Corp..... 648, 650
Dubilier Condenser Corp., United States *v*..... 588
Duffin *v.* Lucas..... 611
Dunne *v.* Maryland..... 564
Earle & Stoddart *v.* Ellerman's Wilson Line..... 420
East Coast Enterprises, McCormick *v*..... 627
Eastern Transportation Co. *v.* Northern Barge Corp. 662
Eddy's Steam Bakery *v.* Rasmusson..... 601
Edwards *v.* Johnston Formation Testing Corp..... 604
Ellerman's Wilson Line, Earle & Stoddart *v*..... 420
Ellis *v.* United States..... 635
Elting, Frischer & Co. *v*..... 649
Elting, Lloyd Sabaudo Societa *v*..... 329
Elting *v.* North German Lloyd..... 324
Erie R. Co. *v.* Healy..... 628
Etchison, Rosslyn Steel & Cement Co. *v*..... 614
E. W. Bliss Co. *v.* United States..... 634
Ex parte International Safety Razor Corp..... 571

Page.
Ex parte James..... 572
Ex parte Lamkin..... 580
Ex parte Miles..... 567
Ex parte United States..... 241
Ex parte Williams..... 573
Factors & Finance Co., United States *v*..... 582
Fairmount Glass Works *v.* Cub Fork Coal Co... 474, 585
Farmer, New York Central R. Co. *v*..... 570
Farmers Bank *v.* Hayes..... 602
Farnum *v.* Public Utilities Comm'n..... 603
Farr, New England Trust Co. *v*..... 612
F. C. Henderson *v.* Railroad Commission..... 672
Federal Trade Comm'n *v.* James S. Kirk & Co..... 663
Federal Trade Comm'n *v.* Royal Milling Co..... 590
F. E. Myers & Bro. Co., N. O. Nelson Mfg. Co. *v*..... 617
Fidelity & Deposit Co. *v.* United States..... 639
Fidelity Union Casualty Co. *v.* Hanson..... 599
Field, Brampton Woolen Co. *v*..... 608
Finnerty, Lehigh & N. E. R. Co. *v*..... 668
First National Bank *v.* Burnet..... 636
First National Bank, Charles Broadway Rouss *v*.... 670
First National Bank *v.* Harrison County..... 611
Fleet Corp., Dietrich *v*..... 646
Florida Bank & Trust Co., Union Indemnity Co. *v*.. 600
Flynn *v.* United States..... 627
Fooshee *v.* Snavely..... 635
Foran *v.* McLaughlin..... 637
Ford, Atlantic Coast Line R. Co. *v*..... 502
Foreign Transport & M. Corp. *v.* Moran Towing Co.. 665
Fort Smith Suburban Ry. Co. *v.* Kansas City Sou. Ry. Co..... 587
Fouts *v.* Georgia..... 569
Fox River Butter Co. *v.* United States..... 628
Franklin *v.* DeLaney..... 629
Franklin Fire Ins. Co., Royal Mail Packet Co. *v*.... 630
Freeport Texas Co. *v.* United States..... 660
Fricke *v.* General Accident F. & L. Assur. Corp..... 662

Page.
Frischer & Co. *v.* Elting 649
Fruit Growers Express Co. *v.* Plate Ice Co 642
Gadek *v.* United States 656
Gann *v.* Commissioner 650
Gebardi *v.* United States 112
General Accident F. & L. Assur. Corp., Fricke *v.* 662
General Electric Co. *v.* Marvel Rare Metals Co 430
General Motors Acceptance Corp., California *v.* 661
General Paint Corp., Kramer *v.* 606
General Tube Co. *v.* Steel & Tubes 668
George A. Ohl & Co. *v.* Smith Iron Works 586
Georgia, Fouts *v.* 569
Gerradiu, United Fruit Co. *v.* 642
Gillette *v.* Luster 660
Gilruth *v.* Luster 660
Girard Life Ins. Co. *v.* Pennsylvania 570
Gliwa *v.* U. S. Steel Corp 627
Goetz *v.* United States 649
Goldstein *v.* Rusch 604
Gonser, Arkwright *v.* 672
Gradwohl *v.* Willcuts 637
Graeber, McMullin *v.* 603
Grand Trunk Western Ry. Co. *v.* Carpenter 605
Grau *v.* United States 124
Graves, Birmingham *v.* 669
Graves *v.* Missouri Pac. R. Co 575
Gray, Central Florida Lumber Co. *v.* 634
Gray *v.* Hecke 655
Great Northern Ry. Co. *v.* Sunburst Oil & Rfg. Co 358, 580
Great Northern Ry. Co., United States *v.* 144
Green *v.* Sauerman 659
Grimes Savings Bank, McHarg *v.* 599
Guaranty Trust Co. *v.* Blodgett 509
Guaranty Trust Co., Rogers *v.* 586
Guggenheim, Burnet *v.* 587
Guidroz, Cherami *v.* 568

Page.
Gulf States Steel Co. *v.* United States..... 32
Gwinn *v.* Commissioner..... 224
Halges, Central Railroad Co. *v*..... 607
Hall, Union Indemnity Co. *v*..... 663
Halsey *v.* Winant..... 620
Hamill, Hawks *v*..... 582, 672
Hamilton National Bank, Scott *v*..... 619
Hammond *v.* Sittel..... 640
Hanrahan *v.* Reiter..... 652
Hanson, Fidelity Union Casualty Co. *v*..... 599
Hare & Chase *v.* National Surety Co..... 662
Harmel, Burnet *v*..... 103
Harnischfeger *v.* Wisconsin Tax Comm'n..... 567
Harrison, Brannan *v*..... 566
Harrison County, First National Bank *v*..... 611
Hartford-Empire Co. *v.* Kearns-Gorsuch Bottle Co.. 658
Hartford-Empire Co. *v.* Lamb Glass Co..... 658
Hartford-Empire Co., Lamb Glass Co. *v*..... 658
Hartford-Empire Co. *v.* Nivinson-Weiskopf Co..... 658
Hartman, Memphis Union Station Co. *v*..... 613
Hartman, Missouri *ex rel.* Louisville & N. R. Co. *v*.. 633
Hartman Furniture & C. Co. *v.* Banning..... 659
Hartman Furniture & C. Co., Banning *v*..... 659
Harvey (Arthur C.) Co. *v.* Malley..... 596
Harville, Missouri Pacific R. Co. *v*..... 610
Haskell *v.* California..... 576
Hawks *v.* Hamill..... 582, 672
Hawks *v.* Iowa..... 597
Hayes, Farmers Bank *v*..... 602
Haynes *v.* Quicksilver..... 602
Hazeltine Corp., Radio Corp. *v*..... 642
H. C. Speer & Sons Co., Williams *v*..... 562
Healdton Oil & Gas Co. *v.* Alexander..... 636
Healy, Erie R. Co. *v*..... 628
Heavner *v.* Lincolnton..... 672
Hecke, Gray *v*..... 655
Heflin (R. L.), Inc. *v.* United States..... 631

Page.
Heidt *v.* United States..... 601
Heiner *v.* Diamond Alkali Co..... 593
Heiner, Diamond Alkali Co. *v*..... 663
Henderson, Binkley Coal Co. *v*..... 670
Henderson (F. C.) *v.* Railroad Commission..... 672
Henry Prentiss & Co., United States *v*..... 585
Hertzman *v.* Lynch..... 605
Heskett *v.* United States..... 643
Hibernia Bank & Trust Co. *v.* Maxwell..... 572
Higgins *v.* Brainard..... 604
Hoenig, Huntington Nat. Bank *v*..... 648
Holt, St. Louis-San Francisco Ry. Co. *v*..... 613
Hooven, Owens, Rentschler Co., Marquette Tool & Mfg. Co. *v*..... 668
Hot Springs Electric L. & P. Co., Clarke *v*..... 619
Howard, Chesapeake & O. Ry. Co. *v*..... 670
Howard *v.* Commissioner..... 619
Howard *v.* Randall & McAllister..... 669
Howard Sheep Co. *v.* United States..... 644
Hughson *v.* United States..... 630
Hume, Mahan *v*..... 575
Huntington National Bank *v.* Hoenig..... 648
Huron Building Co. *v.* Commissioner..... 632
Hursh *v.* Killits..... 640
Hutchens *v.* Luster..... 660
Hutto *v.* Atlantic Life Ins. Co..... 622
Ihrie *v.* Reichelderfer..... 631
Illinois, Michigan *v*..... 568, 578
Illinois, New York *v*..... 568, 578
Illinois, Wisconsin *v*..... 568, 578
Indemnity Insurance Co., Voehl *v*..... 592
Indian Territory Illuminating Oil Co. *v.* Board of Comm'rs..... 573, 594
Indian Territory Illuminating Oil Co. *v.* Board of Equalization..... 573, 594
Ingram, Lewis *v*..... 614
Insurance Building Corp. *v.* Luckenbach S. S. Co... 654

Page.
International Safety Razor Corp., *Ex parte*..... 571
Interstate Commerce Comm'n *v.* New York, N. H. & H. R. Co..... 178
Investors Syndicate, Porter *v*..... 346, 569
Investors Syndicate *v.* Willcuts..... 618
Iowa, Berg *v*..... 598
Iowa, Hawks *v*..... 597
Irving Trust Co., New York *v*..... 587
Irving Trust Co., Schoenthal *v*..... 92
Isenberg *v.* American Factors..... 654
Island Petroleum Co. *v.* Commissioner..... 646
Jackson, Advance-Rumely Thresher Co. *v*..... 283
James, *Ex parte*..... 572
James S. Kirk & Co., Federal Trade Comm'n *v*..... 663
Jamison *v.* United States..... 670
Jarrett, Wabash Ry. Co. *v*..... 627
J. C. Penney Co. *v.* Lewis..... 9
Jenkins *v.* United States..... 622, 628
Jensen *v.* New York Life Ins. Co..... 626
Johnson *v.* California..... 598
Johnson *v.* Star..... 527
Johnson *v.* United States..... 631
Johnson & Higgins *v.* United States..... 459, 583
Johnston Formation Testing Corp., Edwards *v*..... 604
Jonas, Missouri Pacific R. Co. *v*..... 610
Jordan *v.* United States..... 633
Joseph M. Boyd Co., Pobreslo *v*..... 518
Jury, Yates-American Machine Co. *v*..... 615
Kaiser *v.* United States..... 654
Kane *v.* Pottorff..... 603
Kansas City Bridge Co. *v.* Alabama State Bridge Corp..... 644
Kansas City Southern Ry. Co., Ft. Smith Suburban Ry. Co. *v*..... 587
Kawacz *v.* Delaware, L. & W. R. Co..... 659
Kearns-Gorsuch Bottle Co., Hartford-Empire Co. *v*.. 658
Kelly *v.* Texas & Pac. Ry. Co..... 644

Page.
Kelly-Springfield Tire Co. *v.* Overman Cushion Tire Co. 651
Kenney *v.* North Capitol Savings Bank 627
Kentucky, Mellon *v.* 561
Kentucky, Southern Ry. Co. *v.* 561
Keusch *v.* Commissioner 641
Killits, Hursh *v.* 640
Kirk (James S.) & Co., Federal Trade Comm'n *v.* 663
Knox, Redwine *v.* 636
Koehrman *v.* Light 666
Kramer *v.* General Paint Corp 606
Kresge (S. S.) Co. *v.* Bennett 565
Kroger Grocery & Baking Co. *v.* Lewis 9
Kroger Grocery & Baking Co. *v.* Yount 574
LaFatcha *v.* United States 630
Lafontan *v.* American Import & E. Co 664
Lamb Glass Co. *v.* Hartford-Empire Co 658
Lamb Glass Co., Hartford-Empire Co. *v.* 658
Lamkin, *Ex parte* 580
Lamport & Holt, Continental Leather Co. *v.* 644
Lane *v.* Voorhies 654
La Salle Cement Co. *v.* Burnet 624
Lea *v.* North Carolina 668
Leach *v.* California 579
Leenhouts, Wagner *v.* 571
Lehigh & New England R. Co. *v.* Finnerty 668
Lehigh Structural Steel Co. *v.* Rust Engineering Co. 626
Lehigh Valley R. Co., Rocco *v.* 589
Lehman, Spurway *v.* 621
Lehman *v.* Tait 626
Leiby *v.* Pennsylvania R. Co 638
Leon (S.) & Co. *v.* United States 628
Levering & Garrigues Co. *v.* Morrin 590
Levy *v.* Lewis 9
Lewellyn *v.* Diamond Alkali Co 593
Lewis *v.* Ingram 614
Lewis, J. C. Penney Co. *v.* 9

Page.
Lewis, Kroger Grocery & Baking Co. *v.* 9
Lewis, Levy *v.* 9
Lewis, Stewart Dry Goods Co. *v.* 9
Liberty National Co. *v.* Commissioner 603
Light, Bevan *v.* 665
Light, Koehrman *v.* 666
Light, Stranahan *v.* 666
Lincoln Fireproof Warehouse Co. *v.* Milwaukee 567
Lincolnton, Heavner *v.* 672
Littman *v.* Broderick 663
Lloyd Sabaudo Societa *v.* Elting 329
Loeffler, Swarz *v.* 598
Logan *v.* United States 630
Loiza Sugar Co. *v.* Porto Rico 632
Long Island R. Co., New York Trap Rock Corp. *v.* .. 621
Lorenz, Stearns *v.* 565
Lothrop *v.* Robertson 664
Louisville & Nash. R. Co. *v.* Parker 569
Louisville & Nash. R. Co. *v.* Reverman 633
Louisville & N. R. Co., Missouri *ex rel.*, *v.* Hartman .. 633
Lowenstein, Reikes *v.* 669
Lucas, Duffin *v.* 611
Luckenbach S. S. Co., Insurance Bldg. Corp. *v.* 654
Luster, Gillette *v.* 660
Luster, Gilruth *v.* 660
Luster, Hutchens *v.* 660
Luster *v.* Martin 637
Lynch, Hertzman *v.* 605
MacDonald *v.* Peters Co 659
Maclay, New York *v.* 590
Macmillan, Railroad Comm'n *v.* 576
Macmillan Co., Southern Surety Co. *v.* 617
Macy (R. H.) & Co. *v.* DeSimone 607
Maginnis *v.* United States 624
Magnolia Petroleum Co., Brown *v.* 618
Mahan *v.* Hume 575
Maine, Chandler *v.* 572

Page.
Malley, Arthur C. Harvey Co. *v*. 596
Manistique & Lake Superior R. Co. *v*. Musgrove. . . . 669
Marinovich *v*. United States. 637
Marotta, American Surety Co. *v*. 513, 582
Marquette Tool & Mfg. Co. *v*. Hooven Co. 668
Marshall *v*. Commissioner. 621
Martin, Luster *v*. 637
Martin, McMullin *v* 603
Martin Hotel Co. *v*. United States. 651
Marvel Rare Metals Co., General Electric Co. *v*. 430
Maryland, Dunne *v*. 564
Maryland Casualty Co. *v*. County Court. 653
Maryland Casualty Co., County Court *v*. 653
Mason *v*. Shell Petroleum Corp. 656
Massachusetts Mutual Life Ins. Co. *v*. United States. 591
Matthews, Chicago, R. I. & P. Ry. Co. *v*. 640
Maxwell, Hibernia Bank & Trust Co. *v*. 572
Mayer, Brown *v*. 618
McClellan *v*. California 611
McClure *v*. Burnet 609
McCormick *v*. East Coast Enterprises. 627
McCoy *v*. Arkansas Natural Gas Co. 661
McDonnell *v*. United States. 589, 648
McDonough, Bistor *v* 641
McGovern *v*. United States. 650
McHarg *v*. Grimes Savings Bank. 599
McLaughlin, Foran *v* 637
McLaughlin, Pacific Coast Steel Co. *v*. 595
McMullin *v*. Graeber 603
McMullin *v*. Martin 603
McMurray *v*. Reynolds. 664
Meagher, Wagner Tug Boat Co. *v*. 657
Mellon *v*. Kentucky 561
Memphis Cotton Oil Co., United States *v*. 585
Memphis Union Station Co. *v*. Hartman. 613
Merchants & Miners Transp. Co., Bainbridge *v*. 278, 581

Page.
Merritt Oil Corp., Wyoming *ex rel.*, *v.* District Court. 667
Michel *v.* Solimine..... 615
Michigan *v.* Illinois..... 568, 578
Michigan, Wisconsin *v* 571
Midland Savings & Loan Co., Trademens Nat. Bank *v*..... 615
Miles, *Ex parte* 567
Miller *v.* Aderhold 592
Miller, Central Railroad Co. *v*..... 617
Miller *v.* State Board..... 563
Miller, United States *v*..... 625
Millikan, Ohio *ex rel.*, *v.* Cook..... 626
Mills, Bartlesville Zinc Co. *v*..... 602
Milwaukee, Lincoln Fireproof Warehouse Co. *v*.... 567
Missouri *ex rel.* Louisville & N. R. Co. *v.* Hartman.. 633
Missouri-Kansas-Texas R. Co. *v.* Demaray..... 620
Missouri Pacific R. Co., Biggs *v*..... 575
Missouri Pacific R. Co., Graves *v*..... 575
Missouri Pacific R. Co. *v.* Harville..... 610
Missouri Pacific R. Co. *v.* Jonas..... 610
Missouri Pacific R. Co. *v.* Remel..... 634
Missouri Pacific R. Co., St. Louis S. W. Ry. Co. *v*... 589
Missouri Pacific R. Co. *v.* Whelen Springs Gravel Co. 638
Mobile & Ohio R. Co. *v.* Brock..... 638
Moffat Tunnel Improvement Dist. *v.* Boynton..... 620
Monongahela Nat. Bank, Schloss Bros. & Co. *v*..... 661
Mooremack Gulf Lines, Beebe *v*..... 597
Moran, Atchison, T. & S. F. Ry. Co. *v*..... 621
Moran Towing & Transp. Co., Foreign Transport & M. Corp. *v*..... 665
Moran Towing & Transp. Co. *v.* P. Sanford Ross.... 608
Moring *v.* United States..... 635
Morrin, Levering & Garrigues Co. *v*..... 590
Morris *v.* United States..... 597
Moses, Aetna Life Ins. Co. *v*..... 530, 582
Mosher *v.* Phoenix..... 29

Page.
Mt. Vernon, A. & W. Ry. Co. *v.* United States..... 643
Mueller *v.* United States..... 612
Mullendore *v.* Osage Tribe..... 653
Munroe *v.* Raphael..... 591
Murphy, Pantaze *v*..... 599
Murphy Oil Co. *v.* Burnet..... 299
Musgrove, Manistique & L. S. R. Co. *v*..... 669
Myers (F. E.) & Bro. Co., N. O. Nelson Mfg. Co. *v*.. 617
Nagle, Yasuji Fujita *v*..... 624
National Mortgage & Investment Co. *v.* Quinn..... 610
National Shawmut Bank, Topas *v*..... 668
National Shirt Shops *v.* United States..... 633
National Surety Co., Hare & Chase *v*..... 662
National Surety Co. *v.* Topeka..... 658
Navigazione Libera Triestina, American Printing Ink Co. *v*..... 653
Navigazione Libera Triestina, U. S. Steel Products Co. *v*..... 653
Nelson (N. O.) Mfg. Co. *v.* F. E. Myers & Bro. Co... 617
New England Trust Co. *v.* Farr..... 612
New Jersey *v.* Pennsylvania..... 580
Newtown Creek Towing Co. *v.* Baldwin..... 620
New York *v.* Illinois..... 568, 578
New York *v.* Irving Trust Co..... 587
New York *v.* Maclay..... 590
New York Central R. Co. *v.* Farmer..... 570
New York Central R. Co. *v.* The Talisman..... 587
New York Central Securities Corp. *v.* United States. 12
New York & Cuba Mail S. S. Co., N. Y. Dock Co. *v*.. 566
New York Dock Co. *v.* N. Y. & Cuba Mail S. S. Co.. 566
New York & Harlem R. Co., Phoenix Ins. Co. *v*..... 645
New York Life Ins. Co., Jensen *v*..... 626
New York Life Ins. Co., Self *v*..... 607
New York Life Ins. Co., Simons *v*..... 648
New York Life Ins. Co., Vogel *v*..... 604
New York Life Ins. Co., Webber *v*..... 662

Page.
New York, N. H. & H. R. Co., Interstate Commerce Comm'n *v*. 178
New York Trap Rock Corp. *v*. Long Island R. Co. . . . 621
Nivison-Weiskopf Co., Hartford-Empire Co. *v*. 658
N. O. Nelson Mfg. Co. *v*. F. E. Myers & Bro. Co. . . . 617
Norfolk & Western Ry Co. *v*. United States. 134
North Capital Savings Bank, Kenney *v*. 627
North Carolina, Davis *v*. 645, 649
North Carolina, Lea *v*. 668
Northern Barge Corp., Eastern Transportation Co. *v*. 662
North German Lloyd, Elting *v*. 324
Northwestern Life Ins. Co., Donnelly *v*. 638
Norwegian Nitrogen Products Co. *v*. United States. . 586
O'Brien, Van Senden *v*. 608
Occidental Bldg. & Loan Assn., Reed *v*. 623
Ohio *ex rel*. Millikan *v*. Cook. 626
Ohl (George A.) & Co. *v*. Smith Iron Works. 586
One Buick Sedan *v*. United States. 611
Orabona *v*. Clark. 629
Oroville-Wyandotte Irrigation Dist. *v*. Rutherford. . 609
Osage Oil & Rfg. Co., Continental Oil Co. *v*. 616
Osage Tribe, Adams *v*. 652
Osage Tribe, Mullendore *v*. 653
Osage Tribe, Yarbrough *v*. 653
Overman Cushion Tire Co., Kelly-Springfield Tire Co. *v*. 651
Pacific Coast Steel Co. *v*. McLaughlin. 595
Palmer *v*. Bender. 551, 586
Palmolive Co. *v*. Conway. 601
Pan American Petroleum Co. *v*. United States. 612
Pantaze *v*. Murphy. 599
Park *v*. Commissioner. 645
Parker, Louisville & N. R. Co. *v*. 569
Parker *v*. Routzahn. 606
Parker *v*. Sinclair. 644
Parks & Woolson Machine Co. *v*. United States. 634

Page.
Patterson *v.* Alabama 45
Peabody Coal Co. *v.* Commissioner 605
Penney (J. C.) Co. *v.* Lewis 9
Pennsylvania, Dorrance *v.* 660
Pennsylvania, Girard Life Ins. Co. *v.* 570
Pennsylvania, New Jersey *v.* 580
Pennsylvania, Woodward *v.* 600
Pennsylvania R. Co. *v.* Alpine Forwarding Co 647
Pennsylvania R. Co. *v.* Chamberlain 589
Pennsylvania R. Co., Docheney *v.* 665
Pennsylvania R. Co., Leiby *v.* 638
Penny Stores *v.* Rice 672
Perry *v.* Wiggins 609
Peters Co., MacDonald *v.* 659
Petroleum Exploration *v.* Burnet 592
Peytona Lumber Co. *v.* Commissioner 612
Pharr, Atlantic Life Ins. Co. *v.* 647
Phelps, Union Bank & Trust Co. *v.* 588
Philip Carey Mfg. Co. *v.* Dean 623
Phoenix, Mosher *v.* 29
Phoenix Insurance Co. *v.* New York & H. R. Co 645
Pinellas Ice & C. S. Co. *v.* Commissioner 462, 583
Plate Ice Co., Fruit Growers Express Co. *v.* 642
Pobreslo *v.* Joseph M. Boyd Co 518
Porter *v.* Commissioner 591
Porter *v.* Investors Syndicate 346, 569
Portland Gas Light Co., Texas Gulf Sulphur Co. *v.* 601
Porto Rico, Loiza Sugar Co. *v.* 632
Porto Rico *v.* Russell & Co 593
Posner *v.* United States 598
Pottorff, Kane *v.* 603
Powell *v.* Alabama 45
Prentiss (Henry) & Co., United States *v.* 585
Procter & Gamble Mfg. Co. *v.* United States 629
Proechel *v.* United States 658
Provident Savings Bank & Tr. Co. *v.* Shelby County 604
Prudden, School District *v.* 655

Page.
P. Sanford Ross, Moran Towing & Transp. Co. *v*.... 608
Public Service Comm'n, Chicago G. W. R. Co. *v*... 641
Public Utilities Comm'n, Farnum *v*..... 603
Puerto Rico, Loiza Sugar Co. *v*..... 632
Puerto Rico *v*. Russell & Co..... 593
Puritan Pharmaceutical Co. *v*. Ansehl..... 666
Quicksilver, Haynes *v*..... 602
Quinn, National Mortgage & Inv. Co. *v*..... 610
Quinn, Reichelderfer *v* 315
Rabb, Thomas *v* 564
Radio Corporation, Dubilier Condenser Corp. *v*.. 648, 650
Radio Corporation *v*. Hazeltine Corp..... 642
Railroad Commission, Asbury Truck Co. *v*..... 570
Railroad Commission, F. C. Henderson *v*..... 672
Railroad Commission *v*. Macmillan..... 576
Randall & McAllister, Howard *v*..... 669
Raphael, Munroe *v* 591
Rasmusson, Eddy's Steam Bakery *v*..... 601
Real Estate-Land Title & T. Co. *v*. Springfield..... 577
Rederi *v*. Wm. Wrigley, Jr., & Co..... 649
Redwine *v*. Knox..... 636
Reed *v*. Occidental Bldg. & Loan Assn..... 623
Reeves Bros. Co. *v*. Routzahn..... 650
Reichelderfer, Ihrie *v* 631
Reichelderfer *v*. Quinn 315
Reikes *v*. Lowenstein..... 669
Reiter, Hanrahan *v*..... 652
Remel, Missouri Pac. R. Co. *v*..... 634
Reverman, Louisville & N. R. Co. *v*..... 633
Reynolds, McMurray *v*..... 664
R. H. Macy & Co. *v*. DeSimone..... 607
Rhodes *v*. Twing..... 561
Rice, Penny Stores *v*..... 672
Rice, Vancouver Steamship Co. *v*..... 593
Rieker Brewing Co. *v*. United States..... 641
Riley *v*. Chicago Railways Co..... 614
R. L. Heflin *v*. United States..... 631

Page.
Roach, Scheurholz *v*. 623
Robertson, Lothrop *v*. 664
Rocco *v*. Lehigh Valley R. Co. 589
Rogers *v*. Guaranty Trust Co. 586
Rorick *v*. Central Farmers Trust Co. 616
Rosenberg *v*. United States. 645
Rosenthal *v*. West Disinfecting Co. 608
Rosslyn Steel & Cement Co. *v*. Etchison. 614
Ross (P. Sanford), Moran Towing & Transp. Co. *v*. . 608
Routzahn, Parker *v*. 606
Routzahn, Reeves Bros. Co. *v*. 650
Royal Mail Steam Packet Co., Companhia de Navegacao *v*. 607
Royal Mail Steam Packet Co. *v*. Franklin Fire Ins. Co. 630
Royal Milling Co., Federal Trade Comm'n *v*. 590
Rusch, Goldstein *v*. 604
Russell & Co., Puerto Rico *v*. 593
Rust Engineering Co. *v*. Chapman-Stein Co. 625
Rust Engineering Co., Lehigh Structural Steel Co. *v*. 626
Rutherford, Oroville-Wyandotte Irrigation Dist. *v*. . . 609
St. Louis-San Francisco Ry. Co. *v*. Holt. 613
St. Louis Southwestern Ry. Co. *v*. Missouri Pac. R. Co. 589
Salisbury *v*. Salisbury. 597
Salisbury, Salisbury *v*. 597
Sansome *v*. Burnet. 667
Santa Barbara, American Surety Co. *v*. 616
Sauerman, Green *v*. 659
Savelle *v*. State Board. 562
S. A. Woods Machine Co. *v*. Commissioner. 613
Scheurholz *v*. Roach. 623
Schloss Bros. & Co. *v*. Monongahela Nat. Bank. 661
Schoenthal *v*. Irving Trust Co. 92
School District *v*. Prudden. 655
Scott *v*. Chattanooga Finance Co. 619
Scott *v*. Hamilton National Bank. 619

Page.
Scott Lumber Co. *v.* Suburban Improvement Co.... 660
Scottsboro Case..... 45
Scranton Electric Co. *v.* Commissioner..... 595
Seaboard Air Line Ry. Co. *v.* Watson..... 86
Self *v.* New York Life Ins. Co..... 607
Sevier Commission Co. *v.* Wallowa Nat. Bank..... 575
Sgro *v.* United States..... 206
Shapiro *v.* Wilgus..... 348
Shelby County, Provident Savings Bank & Tr. Co. *v.* 604
Shell Petroleum Corp., Churchill *v*..... 656
Shell Petroleum Corp., Mason *v*..... 656
Shell Petroleum Corp., Shore *v*..... 656
Shell Petroleum Corp., Wenrich *v*..... 656
Shevlin Land Co. *v.* Becker County..... 655
Shipping Board, Dietrich *v*..... 646
Shore *v.* Shell Petroleum Corp..... 656
Shreveport Grain & Elevator Co., United States *v*... 77
Sielcken-Schwarz *v.* American Factors..... 654
Silberberg, Winne *v*..... 631
Silverman *v.* United States..... 640
Simon *v.* United States..... 632
Simons *v.* New York Life Ins. Co..... 648
Sinclair, Parker *v*..... 644
Sittel, Hammond *v*..... 640
S. & L. Bldg. Corp., Burnet *v*..... 593
S. Leon & Co. *v.* United States..... 628
Smith, Clarion River Power Co. *v*..... 639
Smith, Spicer *v*..... 590
Smith *v.* United States..... 631
Smith (A. L.) Iron Works, George A. Ohl & Co. *v*... 586
Smoot (W. A.) & Co., Consolidated Indemnity Ins. Co. *v*..... 613
Snavely, Fooshee *v*..... 635
Solimine, Michel *v*..... 615
Sorrells *v.* United States..... 435, 584
South Carolina Ins. Co., Townsend *v*..... 661
Southern Pacific Co. *v.* United States..... 667

Page.
Southern Ry. Co. *v.* Kentucky 561
Southern Ry. Co. *v.* Wilkins 635
Southern Surety Co. *v.* Macmillan Co 617
Speakman *v.* Bernstein 639
Speer (H. C.) & Sons, Williams *v* 562
Spicer *v.* Smith 590
Springfield, Real Estate-Land Title & T. Co. *v* 577
Spurway *v.* Lehman 621
S. S. Kresge Co. *v.* Bennett 565
Stapf, U. S. *ex rel.*, *v.* Corsi 129
Star, Johnson *v* 527
State Board, Miller *v* 563
State Board, Savelle *v* 562
Stearns *v.* Lorenz 565
Steel & Tubes, General Tube Co. *v* 668
Stephenson *v.* Binford 251
Sterling *v.* Constantin 378
Stewart Dry Goods Co. *v.* Lewis 9
Stone & Downer Co. *v.* United States 619
Stranahan *v.* Light 666
Strogan *v.* United States 657
Strother *v.* Burnet 314, 584
Stumpf *v.* United States 618
Suburban Improvement Co., Scott Lumber Co. *v* 660
Sunburst Oil & Rfg. Co., Great Northern Ry. Co. *v* 358, 580
Sun Oil Co. *v.* Dalzell Towing Co 291
Swaner, Utah Idaho Central R. Co. *v* 600
Swarz *v.* Loeffler 598
Swenson *v.* Commissioner 618
Taber *v.* United States 636
Tait, Lehman *v* 626
Talisman, The, New York Central R. Co. *v* 587
Talmadge, Altemus *v* 614
Tamiami Investment Co. *v.* Berk 611
Tax Board, Detroit International Bridge Co. *v* 295
Telfer *v.* Boulton 655

Page.
Tennessee Products Corp., Warner *v*..... 632
Terminal Railroad Ass'n, Central Transfer Co. *v*.... 595
Texas Gulf Sulphur Co. *v*. Portland Gas L. Co..... 601
Texas & Pacific Ry. Co. *v*. Baldwin..... 606
Texas & Pacific Ry. Co., Kelly *v*..... 644
Third National Bank & T. Co. *v*. White..... 577, 585
Thomas *v*. Rabb..... 564
Thorm *v*. United States..... 624
Tillinghast, Costanzo *v*..... 341, 581
Topas *v*. National Shawmut Bank..... 668
Topeka, National Surety Co. *v*..... 658
Townsend *v*. South Carolina Ins. Co..... 661
Tracy *v*. Commissioner..... 632
Trademens National Bank *v*. Midland Savings & L. Co..... 615
Truda *v*. United States..... 589
Twin Falls Canal Co. *v*. American Falls Reservoir Dist. No. 2..... 638
Twing, Rhodes *v*..... 561
Tyler *v*. Chicago Railways Co..... 614
Uhlmann Grain Co., Dickson *v*..... 581
Union Bank & Trust Co. *v*. Phelps..... 588
Union Indemnity Co. *v*. Florida Bank & Tr. Co..... 600
Union Indemnity Co. *v*. Hall..... 663
United Fruit Co. *v*. Gerradiu..... 642
United States *v*. Acme Operating Corp..... 588
United States, Adams *v*..... 652
United States, Alton R. Co. *v*..... 229
United States, Ansardi *v*..... 623
United States, Arkalian *v*..... 643
United States *v*. Arzner..... 470, 583
United States, Blandamer *v*..... 628
United States, Board of Trustees *v*..... 596
United States, Boasberg *v*..... 664
United States, Brink *v*..... 667
United States, Britton *v*..... 669
United States, Brooklyn Eastern Dist. Terminal *v*... 170

Page.
United States, Burkis *v*. 655
United States, Burns *v*. 216, 585
United States, Capriola *v*. 671
United States, Catagrone *v*. 574
United States, Chicago, B. & Q. R. Co. *v*. 599
United States, Chickasaw Nation *v*. 643
United States, Clark *v*. 595
United States, Clift & Goodrich *v*. 617
United States, Cook *v*. 581
United States, Cotter *v*. 666
United States, Crane *v*. 601
United States, Curtiss *v*. 648
United States, D'Agostin *v*. 671
United States *v*. Dakota-Montana Oil Co. 591
United States, Densmore *v*. 598
United States, Denver Rock Drill Mfg. Co. *v*. 651
United States, Detroit Fidelity & Surety Co. *v*. 633
United States, Dillon *v*. 665
United States, Dodaro *v*. 671
United States, Dresser *v*. 635
United States *v*. Dubilier Condenser Corp. 588
United States, Ellis *v*. 635
United States, E. W. Bliss Co. *v*. 634
United States, *Ex parte*. 241
United States *v*. Factors & Finance Co. 582
United States, Fidelity & Deposit Co. *v*. 639
United States, Flynn *v*. 627
United States, Fox River Butter Co. *v*. 628
United States, Freeport Texas Co. *v*. 660
United States, Gadek *v*. 656
United States, Gebardi *v*. 112
United States, Goetz *v*. 649
United States, Grau *v*. 124
United States *v*. Great Northern Ry. Co. 144
United States, Gulf States Steel Co. *v*. 32
United States, Heidt *v*. 601
United States *v*. Henry Prentiss & Co. 585

Page.
United States, Heskett *v*..... 643
United States, Howard Sheep Co. *v*..... 644
United States, Hughson *v*..... 630
United States, Jamison *v*..... 670
United States, Jenkins *v*..... 622, 628
United States, Johnson *v*..... 631
United States, Johnson & Higgins *v*..... 459, 583
United States, Jordan *v*..... 633
United States, Kaiser *v*..... 654
United States, LaFatcha *v*..... 630
United States, Logan *v*..... 630
United States, Maginnis *v*..... 624
United States, Marinovich *v*..... 637
United States, Martin Hotel Co. *v*..... 651
United States, Massachusetts Mut. Life Ins. Co. *v*... 591
United States, McDonnell *v*..... 589, 648
United States, McGovern *v*..... 650
United States *v*. Memphis Cotton Oil Co..... 585
United States *v*. Miller..... 625
United States, Moring *v*..... 635
United States, Morris *v*..... 597
United States, Mt. Vernon, A. & W. Ry. Co. *v*..... 643
United States, Mueller *v*..... 612
United States, National Shirt Shops *v*..... 633
United States, N. Y. Central Securities Corp. *v*..... 12
United States, Norfolk & Western Ry. Co. *v*..... 134
United States, Norwegian Nitrogen Products Co. *v*. 586
United States, One Buick Sedan *v*..... 611
United States, Pan American Petroleum Co. *v*..... 612
United States, Parks & Woolson Machine Co. *v*..... 634
United States, Posner *v*..... 598
United States, Procter & Gamble Mfg. Co. *v*..... 629
United States, Proechel *v*..... 658
United States, Rieker Brewing Co. *v*..... 641
United States, R. L. Heflin *v*..... 631
United States, Rosenberg *v*..... 645
United States, Sgro *v*..... 206

Page.
United States *v.* Shreveport Grain & Elevator Co.... 77
United States, Silverman *v*..... 640
United States, Simon *v*..... 632
United States, S. Leon & Co. *v*..... 628
United States, Smith *v*..... 631
United States, Sorrells *v*..... 435, 584
United States, Southern Pacific Co. *v*..... 667
United States, Stone & Downer Co. *v*..... 619
United States, Strogan *v*..... 657
United States, Stumpf *v*..... 618
United States, Taber *v*..... 636
United States, Thorm *v*..... 624
United States, Truda *v*..... 589
United States, Walsh *v*..... 671
United States, Webster *v*..... 629
United States, Wilson *v*..... 623
U. S. *ex rel.* Chestatee Pyrites & C. Corp., Wilbur *v*.. 588
U. S. *ex rel.* Stapf *v.* Corsi..... 129
U. S. *ex rel.* Yokinen *v.* Commissioner..... 607
U. S. Fidelity & G. Co. *v.* Bassinger..... 622
U. S. Fidelity & G. Co., Wyer *v*..... 647
U. S. Industrial Alcohol Co. *v.* Calmar S. S. Corp.... 622
U. S. Shipping Board, Dietrich *v*..... 646
U. S. Steel Corp., Gliwa *v*..... 627
U. S. Steel Products Co. *v.* Navigazione Libera Triestina..... 653
U. S. Zinc Co. *v.* Central States Power & L. Corp.... 660
Untermyer *v.* Commissioner..... 647
Utah Idaho Central R. Co. *v.* Swaner..... 600
Vancouver Steamship Co. *v.* Rice..... 593
Van Senden *v.* O'Brien..... 608
Voehl *v.* Indemnity Insurance Co..... 592
Vogel *v.* New York Life Ins. Co..... 604
Voorhies, Lane *v*..... 654
Wabash Ry. Co., Brady *v*..... 619
Wabash Ry. Co. *v.* Jarrett..... 627
Wabash Valley Electric Co. *v.* Young..... 488

Page.
Wagner *v.* Leenhouts..... 571
Wagner Tug Boat Co. *v.* Meagher..... 657
Wallace, American Airways *v*..... 565
Wallowa National Bank, Sevier Comm'n Co. *v*..... 575
Walsh *v.* United States..... 671
Ward *v.* Commissioner..... 656
Warner *v.* Tennessee Products Corp..... 632
Washington Fidelity Nat. Ins. Co. *v.* Burton..... 97
W. A. Smoot & Co., Consolidated Indemnity & Ins. Co. *v*..... 613
Watson, Seaboard Air Line Ry. Co. *v*..... 86
Webber *v.* New York Life Ins. Co..... 662
Webster *v.* United States..... 629
Weems *v.* Alabama..... 45
Wenrich *v.* Shell Petroleum Corp..... 656
West Disinfecting Co., Rosenthal *v*..... 608
Westmoreland Specialty Co. *v.* Burnet..... 609
Whelen Springs Gravel Co., Missouri Pac. R. Co. *v*.. 638
White, Third National Bank & T. Co. *v*..... 577, 585
Whiteford, Clawans *v*..... 605
Wiggins, Perry *v*..... 609
Wilbur *v.* U. S. *ex rel.* Chestatee Pyrites & C. Corp.. 588
Wilgus, Shapiro *v*..... 348
Wilkins, Southern Ry. Co. *v*..... 635
Willcuts, Gradwohl *v*..... 637
Willcuts, Investors Syndicate *v*..... 618
Williams *v.* Annapolis..... 594
Williams *v.* Baltimore..... 594
Williams, *Ex parte*..... 573
Williams *v.* H. C. Speer & Sons Co..... 562
Wm. Wrigley, Jr., & Co., Rederi *v*..... 649
Wilson *v.* Anderson..... 592
Wilson, Anderson *v*..... 592
Wilson *v.* United States..... 623
Winant, Halsey *v*..... 620
Winne *v.* Silberberg..... 631
Wisconsin *v.* Illinois..... 578

Page.
Wisconsin *v.* Michigan 571
Wisconsin Tax Comm'n, Harnischfeger *v.* 567
Wood *v.* Broom 1
Wood, Chesapeake & O. Ry. Co. *v.* 646
Woodward *v.* Pennsylvania 600
Wrigley (Wm.) Jr., & Co., Rederi *v.* 649
Wyer *v.* U. S. Fidelity & G. Co 647
Wyoming *v.* Colorado 579
Wyoming *ex rel.* Merritt Oil Corp. *v.* District Court. 667
Yarbrough *v.* Osage Tribe 653
Yasuji Fujita *v.* Nagle 624
Yates-American Machine Co. *v.* Jury 615
Yokinen, U. S. *ex rel.*, *v.* Commissioner 607
Young *v.* Commissioner 652
Young, Wabash Valley Electric Co. *v.* 488
Yount, Kroger Grocery & Baking Co. *v.* 574

TABLE OF CASES

Cited in Opinions

Page.

Abbotsford, The, 98 U. S. 440 176, 481
Abdu, *Ex parte*, 247 U. S. 27 247, 281
Adams *v.* Jones, 11 F. (2d) 759 96
Adams *v.* New York, 192 U. S. 585 215
Addington *v.* United States, 165 U. S. 184 481
Adkins *v.* Children's Hospital, 261 U. S. 525 77, 274, 288
Aetna Casualty & S. Co. *v.* Phoenix Nat. Bank & T. Co., 285 U. S. 209 544
Aetna Insurance Co. *v.* Hyde, 275 U. S. 440 297
Alabama *v.* United States, 279 U. S. 229 565
Alaska Packers Assn. *v.* Gover, 278 Fed. 927 481
Alderson *v.* Temple, Burr. 2235 94
Alejandrino *v.* Quezon, 271 U. S. 528 576
Alexander *v.* King, 46 F. (2d) 235 106, 109, 111
Allen *v.* Gardner, 182 N. C. 425 396
Allen *v.* State, 40 Ala. 334 442
Allied Metal Stamping Co. *v.* Standard Elec. Equip. Corp., 55 F. (2d) 221 433
Allis-Chalmers Mfg. Co. *v.* Frank, 57 N. D. 295 288
Alpha S. S. Corp. *v.* Cain, 281 U. S. 642 375
American Mills Co. *v.* American Surety Co., 260 U. S. 360 96, 434

Page.

American R. Co. *v.* Santiago, 9 F. (2d) 753 484
American Ry. Express Co. *v.* Kentucky, 273 U. S. 269 567
American Surety Co. *v.* Baldwin, 287 U. S. 156 366, 367
American Surety Co. *v.* Conner, 251 N. Y. 1 355
American Surety Co. *v.* Hattrem, 138 Ore. 358 518
Andrews *v.* United States, 162 U. S. 420 441
Apex Electric Mfg. Co., *Ex parte*, 274 U. S. 725 248
Arizona Grocery Co. *v.* Atchison, T. & S. F. Ry. Co., 284 U. S. 370 362, 367
Arkansas Cattle Co. *v.* Mann, 130 U. S. 69 481
Arkell & Douglas *v.* United States, 13 F. (2d) 555 427
Armitage *v.* Horseshoe Bend Co., 35 Idaho 179 167
Arneson *v.* United Irrigation Co., 284 U. S. 592 571
Arroyo *v.* State, 69 S. W. 503 396
Astrakhan, The, [1910] P. 172 175
Atchison, T. & S. F. Ry. Co. *v.* Matthews, 174 U. S. 96 90
Atchison, T. & S. F. Ry. Co. *v.* Toops, 281 U. S. 351 570
Atchison, T. & S. F. Ry. Co. *v.* United States, 279 U. S. 768 233
Atchison, T. & S. F. Ry. Co. *v.* Wells, 265 U. S. 101 164
Atkin *v.* Barwick, 1 Stra. 165 94

Page.

Atkin *v.* Kansas, 191 U. S. 207 275
Atkins *v.* Moore, 82 Ill. 240 543
Atlantic Coast Line R. Co. *v.* Daughton, 262 U. S. 413 11
Atlantic Coast Line R. Co. *v.* Georgia, 234 U. S. 280 509
Atlantic Coast Line R. Co. *v.* Mims, 242 U. S. 532 169
Atlantic Coast Line R. Co. *v.* Riverside Mills, 219 U. S. 186 274
Atlas Portland Cement Co. *v.* American Brick Co., 280 Pa. St. 449 355
Aultman *v.* United States, 289 Fed. 251 441
Autosales Corp *v.* Commissioner, 43 F. (2d) 931 546
Avent *v.* United States, 266 U. S. 127 25
Ayers *v.* Watson, 137 U. S. 584 481
Ayres *v.* Carver, 17 How. 591 432
Babcock, *In re*, 26 F. (2d) 153 246
Baender *v.* Barnett, 255 U. S. 224 448
Bailey *v.* Alabama, 219 U. S. 219 508
Bakelite Corp'n, *Ex parte*, 279 U. S. 438 8
Baldwin *v.* Iowa State Men's Traveling Assn., 283 U. S. 522 165, 166
Baldwin *v.* Kansas, 129 U. S. 52 169
Baldwin *v.* Singer Sewing Machine Co., 49 Idaho 231 161
Baltimore & O. R. Co. *v.* Interstate Commerce Comm'n, 221 U. S. 612 274
Baltimore S. S. Co. *v.* Phillips, 274 U. S. 316 375
Banco Mercantil *v.* Taggart Coal Co., 276 Fed. 388 433
Bandini Petroleum Co. *v.* Superior Court, 284 U. S. 8 397, 567, 580

Page.

Bank *v.* Owens, 2 Pet. 527 455
Bankers Pocahontas Coal Co. *v.* Burnet, 287 U. S. 308 314, 558
Bank Line *v.* Porter, 25 F. (2d) 843 427
Bank of Indianola *v.* Miller, 276 U. S. 605 575
Banta *v.* Stamford Motor Co., 89 Conn. 51 175
Barber Asphalt Paving Co. *v.* Morris, 132 Fed. 945 246
Barbour *v.* Georgia, 249 U. S. 454 169
Barnes *v.* Freeland, 6 D. & E. 80 94
Barr *v.* Gratz, 4 Wheat. 213 481
Barrett *v.* Van Pelt, 268 U. S. 85 344
Barron *v.* United States, 5 F. (2d) 799 121
Bartle *v.* Nutt, 4 Pet. 184 455
Bartlett *v.* Kane, 16 How. 263 335
Bass Furniture Co. *v.* Electric Supply Co., 101 Okla. 293 484
Batchelor *v.* State, 189 Ind. 69 57, 58
Bates *v.* United States, 10 Fed. 92, note, p. 97 441, 442
Bauer *v.* Commonwealth, 135 Va., 463 444
Bauman *v.* Ross, 167 U. S. 548 322, 323
Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232 570
Benson *v.* Henkel, 198 U. S. 1 250
Berg *v.* Commissioner, 33 F. (2d) 641 109, 112
Bernhard *v.* Idaho Bank & Tr. Co., 21 Idaho 598 166
Bethlehem Shipbuilding Corp. *v.* Gutradt Co., 10 F. (2d) 769 426
Bianchi *v.* Morales, 262 U. S. 170 168
Billingsley *v.* United States, 274 Fed. 86 443
Binford *v.* McLeaish, 284 U. S. 598 393, 566

Page.
Bingaman *v.* Seattle, 139 Wash. 68 484
Bishop *v.* Vandercook, 228 Mich. 299 396
Blaikie *v.* Linton, 18 Scottish L. Rep. 583 444
Blair *v.* United States, 250 U. S. 273 77
Boese *v.* King, 108 U. S. 379 526, 529
Boggs & Buhl *v.* Commissioner, 34 F. (2d) 859 313
Boonville National Bank *v.* Blakey, 166 Ind. 427 96
Boston & Maine R. Co. *v.* Dutille, 289 Fed. 320 481
Bowers *v.* New York & Albany Lighterage Co., 273 U. S. 346 38, 39, 45
Boyce's Executors *v.* Grundy, 3 Pet. 210 95
Boyd *v.* United States, 116 U. S. 616 128, 210, 215
Boyle, *In re*, 6 Idaho 609 396
Bradford Electric Light Co. *v.* Clapper, 286 U. S. 145 166
Bradley *v.* Richmond, 227 U. S. 477 566
Brewster *v.* Gage, 280 U. S. 327 190, 303
Brimstone R. Co. *v.* United States, 276 U. S. 104 240
Brinkerhoff-Faris Co. *v.* Hill, 281 U. S. 673 164, 364, 367, 505, 567
Briscoe *v.* District of Columbia, 221 U. S. 547 91
Brooklyn Park Comm'rs *v.* Armstrong, 45 N. Y. 234 320, 322
Brown *v.* Clarke, 4 How. 4 481
Brown *v.* Duchesne, 19 How. 183 345
Brown *v.* Massachusetts, 144 U. S. 573 169
Brown-Forman Co. *v.* Kentucky, 217 U. S. 563 566
Brownlow *v.* Schwartz, 261 U. S. 216 576
Bruce *v.* Tobin, 245 U. S. 18 562
Bryan *v.* Louisville & N. R. Co., 244 Fed. 650 319
Page.
Buck *v.* Kuykendall, 267 U. S. 307 266
Buffalo Specialty Co. *v.* Vancleef, 217 Fed. 91 434
Burbank *v.* Fay, 65 N. Y. 57 322
Burkett *v.* Commissioner, 31 F. (2d) 667 109, 112
Burk-Waggoner Oil Assn. *v.* Hopkins, 269 U. S. 110 110
Burns Baking Co. *v.* Bryan, 264 U. S. 504 290
Burnet *v.* Coronado Oil Co., 285 U. S. 393 110
Burnet *v.* Harmel, 287 U. S. 103 301, 302, 310, 555, 558
Burnet *v.* Porter, 283 U. S. 230 153
Burnet *v.* Thompson Oil & Gas Co., 283 U. S. 301 303, 307, 311
Busch *v.* Interborough Rapid Transit Co., 187 N. Y. 388 372
Bush Co. *v.* Maloy, 267 U. S. 317 266
Buttfield *v.* Stranahan, 192 U. S. 470 85
Butts *v.* United States, 273 Fed. 35 443
Buzard *v.* Houston, 119 U. S. 347 95
Byars *v.* United States, 273 U. S. 28 127, 210, 215
Calder *v.* Bull, 3 Dall. 386 281
Caldwell *v.* Sioux Falls Stock Yards Co., 242 U. S. 559 580
Caledonia, The, 157 U. S. 124 426
Calhoun *v.* Memphis & P. R. Co., Fed. Cas. No. 2,309 517
California Nat. Bank *v.* Stateler, 171 U. S. 447 562
Caminetti *v.* United States, 242 U. S. 470 84, 120
Campbell *v.* Aderhold, 36 F. (2d) 366 219, 222
Cannon Mfg. Co. *v.* Cudahy Co., 267 U. S. 333 419
Capital Nat. Bank *v.* Board of Supervisors, 286 U. S. 550 161, 569, 599, 658
Capitol Transportation Co. *v.* Cambria Steel Co., 249 U. S. 334 429

Page.
Capuano *v.* United States, 9 F. (2d) 41 443
Carib Prince, The, 170 U. S. 655 426
Carlisle *v.* United States, 16 Wall. 147 448
Carpenter & Sprague *v.* Dane County, 9 Wis. 274 72
Carroll *v.* Carroll's Lessee, 16 How. 275 400
Casey *v.* United States, 276 U. S. 413 443, 446, 454
Castillo *v.* McConnico, 168 U. S. 674 570
Castle *v.* Bullard, 23 How. 172 507
Cavanaugh *v.* Looney, 248 U. S. 453 393
Cayuga, The, 7 Blatch. 385 177
Central Land Co. *v.* Laidley, 159 U. S. 103 365
Central R. Co. *v.* United States, 257 U. S. 247 233
Cermak *v.* United States, 4 F. (2d) 99 443
Chadwick *v.* United States, 141 Fed. 225 121, 122
Chambers *v.* Baltimore & O. R. Co., 207 U. S. 142 280
Champion Spark Plug Co. *v.* Champion Ignition Co., 247 Fed. 200 434
Champlin Rfg. Co. *v.* Corporation Comm'n, 286 U. S. 210 386, 397
Charles River Bridge *v.* Warren Bridge, 11 Pet. 420 77, 321
Chase Nat. Bank *v.* United States, 278 U. S. 327 229
Chelentis *v.* Luckenbach S. S. Co., 247 U. S. 372 371
Cheney Bros. *v.* Doris Silk Corp., 35 F. (2d) 279 319
Chesapeake & Ohio Ry. Co. *v.* Gainey, 241 U. S. 494 484
Chesapeake & Ohio Ry. Co. *v.* Proffitt, 218 Fed. 23 481
Chesapeake & Ohio Ry. Co. *v.* United States, 283 U. S. 35 25
Chew Heong *v.* United States, 112 U. S. 536 448
Page.
Chicago *v.* Greer, 9 Wall. 726 482
Chicago *v.* Union Bldg. Assn., 102 Ill. 379 322
Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226 66, 67
Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549 274, 291, 446
Chicago, K. & W. R. Co. *v.* Pontius, 157 U. S. 209 90
Chicago, M. & St. P. Ry. Co. *v.* Voelker, 129 Fed. 522 83
Chin Loy You, *Ex parte*, 223 Fed. 833 70
Chin Yow *v.* United States, 208 U. S. 8 336
Christ Church *v.* Philadelphia County, 24 How. 300 321
Christopher *v.* Grueby, 40 F. (2d) 8 426
Cincinnati *v.* White, 6 Pet. 431 320
Citizens Nat. Bank *v.* Durr, 257 U. S. 99 562, 573
Claiborne-Annapolis Ferry Co. *v.* United States, 285 U. S. 382 27
Clark *v.* Providence, 16 R. I. 337 320
Cleveland, C., C. & St. L. Ry. Co. *v.* United States, 275 U. S. 404 26, 27
Cline *v.* United States, 20 F. (2d) 494 444
Clune *v.* United States, 159 U. S. 590 121, 481
Cobb *v.* Lepisto, 6 F. (2d) 128 485
Coder *v.* Arts, 213 U. S. 223 518
Coffin Bros. & Co. *v.* Bennett, 277 U. S. 29 168
Cohens *v.* Virginia, 6 Wheat. 264 400
Collett *v.* Adams, 249 U. S. 545 95
Collins *v.* Phoenix, 54 F. (2d) 770 30
Colorado *v.* United States, 271 U. S. 153 25, 26

Page.
Columbia Heights Realty Co. *v.* Rudolph, 217 U. S. 547 480
Columbia Ry. *v.* South Carolina, 261 U. S. 236 512
Columbus Ry., P. & L. Co. *v.* Columbus, 249 U. S. 399 30
Cook *v.* Packard Motor Car Co., 88 Conn. 590 175, 176
Coolidge *v.* Long, 282 U. S. 582 229
Commonwealth *v.* Fidelity & C. Trust Co., 185 Ky. 300 364
Commonwealth *v.* McGovern, 183 Mass. 238 220, 222
Commonwealth *v.* O'Keefe, 298 Pa. 169 58, 59
Commonwealth *ex rel.* Wadsworth *v.* Shortall, 206 Pa. St. 165 396
Compagnie Francaise *v.* Elting, 19 F. (2d) 773 328
Compania de Navegacion *v.* Insurance Co., 277 U .S. 66 295
Connally *v.* General Construction Co., 269 U. S. 385 82
Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602 318
Connor *v.* People, 18 Colo. 373 442
Conqueror, The, 166 U. S. 110 174, 175, 176
Consolidated Turnpike Co. *v.* Norfolk & O. V. Ry. Co., 228 U. S. 326 367
Continental Baking Co. *v.* Woodring, 286 U. S. 352 269, 393
Continental Ins. Co. *v.* Loud & Sons Co., 93 Mich. 139 543
Continental Tie & L. Co. *v.* United States, 286 U. S. 290 146
Cook *v.* Johnson, 12 N. J. Eq. 51 518
Cooke *v.* United States, 267 U. S. 517 69

Page.
Coolidge *v.* Long, 282 U. S. 582 513
Coombes *v.* Getz, 285 U. S. 434 362
Cooper, *In re,* 162 Cal. 81 123
Cooper *v.* Newell, 173 U. S. 555 164
Cooper *v.* Stinson, 5 Minn. 522 517
Corcoran *v.* United States, 19 F. (2d) 901 444
Corkran Oil Co. *v.* Arnaudet, 199 U. S. 182 164
Corn Exchange Bank *v.* Commissioner, 280 U. S. 218 168
Cortland Specialty Co. *v.* Commissioner, 60 F. (2d) 937 470
Coupland, *Ex parte,* 26 Tex. 386 396
Craig *v.* Continental Ins. Co., 141 U. S. 638 425
Crandall, *Ex parte,* 52 F. (2d) 650 281
Crane, *Ex parte,* 5 Pet. 190 245
Crawford *v.* United States, 40 F. (2d) 199 472
Cresswell *v.* Tillinghast, 286 U. S. 560 568
Creswill *v.* Knights of Pythias, 225 U. S. 246 398
Crocker *v.* United States, 240 U. S. 74 455
Crooks *v.* Harrelson, 282 U. S. 55 110
Cross Lake Club *v.* Louisiana, 224 U. S. 632 577
Cumberland Coal Co. *v.* Board, 284 U. S. 23 367
Cunningham *v.* Norton, 125 U. S. 77 528
Cutts *v.* State, 54 Fla. 21 70, 72
Cuyahoga Power Co. *v.* Akron, 240 U. S. 462 31
Cuyamel Fruit Co. *v.* Nedland, 19 F. (2d) 489 174
Dane County *v.* Smith, 13 Wis. 585 72
Daugherty, *Ex parte,* 282 U. S. 809 248
David *v.* United States, 283 U. S. 859 623

Page.

Davidson *v.* New Orleans, 96 U. S. 97 77
Davis *v.* Gray, 16 Wall. 203 393
Davis *v.* Wakelee, 156 U. S. 680 11
Davis *v.* Wallace, 257 U. S. 478 394
Dearing *v.* McKinnon Dash Co., 175 N. Y. 78 355
Decker *v.* Decker, 108 N. Y. 128 355
Delaware & Hudson Co. *v.* United States, 266 U. S. 438 240
Delaware, L. & W. R. Co. *v.* Rellstab, 276 U. S. 1 246
Delk *v.* State, 99 Ga. 667 72
Dellwo *v.* Petersen, 34 Idaho 697 167
Denton *v.* Yazoo & M. V. R. Co., 284 U. S. 305 295
Des Moines Gas Co. *v.* Des Moines, 238 U. S. 153 191
Detroit Properties Corp., *In re*, 254 Mich. 523 297
Detroit Trust Co. *v.* Old National Bank, 155 Mich. 61 96
Di Salvo *v.* United States, 2 F. (2d) 222 443
Doll *v.* Chicago Great Western R. Co., 159 Minn. 323 281
Doney *v.* Northern Pacific Ry. Co., 60 Mont. 209 359, 361, 363, 367
Douglas *v.* New York, N. H. & H. R. Co., 279 U. S. 377 280
Douglass *v.* Montgomery, 118 Ala. 599 320
Douglass *v.* Pike County, 101 U. S. 677 364
Driskill *v.* United States, 24 F. (2d) 525 444
Duggan *v.* United States, 36 F. (2d) 804 472
Dunbar *v.* New York, 251 U. S. 516 505
Dunn *v.* United States, 284 U. S. 390 485
D'Utassy *v.* Mallory S. S. Co., 162 App. Div. 410 428
Dwyer *v.* United States, 170 Fed. 160 483

Page.

Eagle Cotton Oil Co. *v.* Southern Ry. Co., 51 F. (2d) 443 363
East Chicago Co. *v.* East Chicago, 171 Ind. 654 320
East St. Louis Co. *v.* Skinner Bros. Co., 249 Fed. 439 484
Eau Claire *v.* Wisconsin-Minnesota L. & P. Co., 178 Wis. 207 496
Edwards Co. *v.* La Dow, 230 Fed. 378 96
Edwin I. Morrison, The, 153 U. S. 199 426
Eisner *v.* Macomber, 252 U. S. 189 108, 420
Eldridge *v.* Binghampton, 120 N. Y. 309 320, 323
Electric Boat Co. *v.* Lake Boat Co., 215 Fed. 377 434
Elizabeth Dantzler, The, 263 Fed. 596 427
Elletson Co., *In re*, 174 Fed. 859 355
Ellis *v.* United States, 206 U. S. 246 276, 445
Ellison Ranching Co. *v.* Bartlett, 284 U. S. 598 571
Elting *v.* North German Lloyd, 287 U. S. 324 340
Emancipation Cases, 31 Tex. 504 396
Emery *v.* Central Trust & S. D. Co., 204 Fed. 965 433
Emma Kate Ross, The, 50 Fed. 845 177
Empire State-Idaho Mining & D. Co. *v.* Hanley, 136 Fed. 99 161
Engel *v.* Davenport, 271 U. S. 33 280
Erie R. Co. *v.* Solomon, 237 U. S. 427 92, 575
Eteepain Co-op Society *v.* Lillback, 18 F. (2d) 912 484
Etna Maru, The, 20 F. (2d) 143 427
Euclid *v.* Ambler Realty Co., 272 U. S. 365 272
Ewing *v.* Howard, 7 Wall. 499 482
Falconer *v.* Simmons, 51 W. Va. 172 365

Page.
Fant *v.* Elsbury, 68 Tex. 1 529
Farrior *v.* New England Mortgage Co., 92 Ala. 176 365
Farrow *v.* Mayes, 18 Q. B. 516 94
Favorita, The, 8 Blatch. 539 177
Fawcus Machine Co. *v.* United States, 282 U. S. 375 190, 345
Federal Trade Comm'n *v.* Pacific Paper Assn., 273 U. S. 52 331
Felton *v.* Spiro, 78 Fed. 576 483
Felts v. Murphy, 201 U. S. 123 69
Ferguson *v.* Commissioner, 45 F. (2d) 573 105, 111
Ferguson *v.* Commissioner, 59 F. (2d) 891 109
Fetters *v.* United States, 283 U. S. 638 250
Fidelity & Deposit Co. *v.* Gaston, Williams & Wigmore, 13 F. (2d) 267 166
Fidelity & Deposit Co. *v.* Tafoya, 270 U. S. 426 32, 393
Fidelity Nat. Bank & Tr. Co. *v.* Swope, 274 U. S. 123 167
Fidelity Union Casualty Co. *v.* Hanson, 287 U. S. 599 161, 569, 658
Finer *v.* Commonwealth, 250 Mass. 493 220
Finn *v.* Railroad Comm'n, 286 U. S. 559 568
Firestone Tire & R. Co. *v.* Marlboro Cotton Mills, 282 Fed. 811 165
First Nat. Bank *v.* Hartford, 273 U. S. 548 398
First Nat. Bank *v.* Morgan, 132 U. S. 141 281
First State Bank *v.* Spencer, 219 Fed. 503 96
First Unitarian Society *v.* Faulkner, 91 U. S. 415 507
Fiske *v.* Kansas, 274 U. S. 380 398
Fitzgerald Construction Co. *v.* Fitzgerald, 137 U. S. 98 481, 482
Fleming *v.* Fleming, 264 U. S. 29 364, 365, 505
Page.
Fluke *v.* Canton, 31 Okla. 718 396
Ford *v.* Delta Pine & Land Co., 164 U. S. 662 344
Ford Hydro-Electric Co. *v.* Neely, 13 F. (2d) 361 486
Ford Motor Co. *v.* Hotel Woodward Co., 271 Fed. 625 481
Fox *v.* Cincinnati, 104 U. S. 783 319
Fox *v.* Dallas Hotel Co., 111 Tex. 461 538
Fox *v.* Washington, 236 U. S. 273 563
Frank *v.* Mangum, 237 U. S. 309 69
Franks *v.* Smith, 142 Ky. 232 396
Franks *v.* United States, 43 F. (2d) 455 472
Fraser *v.* Bentel, 161 Cal. 390 517
Freeborn *v.* Smith, 2 Wall. 160 482
Frisbie *v.* United States, 157 U. S. 160 274, 291
Frost Trucking Co. *v.* Railroad Comm'n, 271 U. S. 583 264, 267, 275
Fulmele *v.* Forrest, 27 Del. 155 484
Furness, Withy & Co. *v.* Yang-Tsze Insurance Assn., 242 U. S. 430 102
Furrow *v.* United States, 46 F. (2d) 647 219
Galpin *v.* Page, 18 Wall. 350 68
Gambino *v.* United States, 275 U. S. 310 457
Gargano *v.* United States, 24 F. (2d) 625 443
Garrison *v.* Memphis Ins. Co., 19 How. 312 542
Gasoline Products Co. *v.* Champlin Rfg. Co., 283 U. S. 494 480
Gelinas *v.* Buffum, 52 F. (2d) 598 96
Gelpcke *v.* Dubuque, 1 Wall. 175 364, 365
Geo. E. Keith Co. *v.* Abrams, 43 F. (2d) 557 481
Georgia *v.* Cincinnati Southern Ry. Co., 248 U. S. 26 203

Page.

Georgia Comm'n *v.* United States, 283 U. S. 765 29
Gibson *v.* United States, 166 U. S. 269 319
Gilchrist *v.* Chicago Ins. Co., 104 Fed. 566 176
Giles *v.* United States, 284 Fed. 208 126, 128
Girard Trust Co. *v.* Ocean Lake & Realty Co., 286 U. S. 523 577
Githens *v.* Shiffler, 112 Fed. 505 518
Gitlow *v.* New York, 268 U. S. 652 67
Glaser, *In re*, 198 U. S. 171 247
Glendola, The, 47 F. (2d) 206 174
Glenn *v.* Marbury, 145 U. S. 499 540
Glenwood Irrigation Co. *v.* Vallery, 248 Fed. 483 483
Go-Bart Co. *v.* United States, 282 U. S. 344 128
Godchaux Co. *v.* Estopinal, 251 U. S. 179 164, 366, 562
Goetz, Matter of, 71 App. Div. 272 517
Goldfield Consolidated Mines Co. *v.* Scott, 247 U. S. 126 108
Goldsmith *v.* Board of Tax Appeals, 270 U. S. 117 312
Goode *v.* United States, 159 U. S. 663 441
Gordon *v.* Butler, 105 U. S. 553 153
Gorham Mfg. Co. *v.* Tax Comm'n, 266 U. S. 265 565
Gouled *v.* United States, 255 U. S. 298 128
Graham *v.* du Pont, 262 U. S. 234 40
Graham & Foster *v.* Goodcell, 282 U. S. 409 312
Grand Chute *v.* Winegar, 15 Wall. 373 95
Grand Trunk Western Ry. Co. *v.* Heatlie, 48 F. (2d) 759 481
Grand Trunk Western Ry. Co. *v.* United States, 252 U. S. 112 153

Page.

Grant *v.* National Bank, 197 Fed. 581 95
Grant *v.* Shipping Board, 24 F. (2d) 812 282
Grant Timber & Mfg. Co. *v.* Gray, 236 U. S. 133 168
Grays Harbor Logging Co. *v.* Coats-Fordney Co., 243 U. S. 251 562
Great Northern Ry. Co. *v.* Sunburst Oil & Rfg. Co., 287 U. S. 358 505, 513
Great Northern Ry. Co. *v.* United States, 277 U. S. 172 151
Green *v.* Frazier, 253 U. S. 233 446
Green *v.* Skinner, 185 Cal. 435 228
Greenleaf Johnson Lumber Co. *v.* Garrison, 237 U. S. 251 319
Greta Holme, [1897] A. C. 596 174
Grimm *v.* United States, 156 U. S. 604 441, 451
Grogan *v.* Commonwealth, 222 Ky. 484 73
Group No. 1 Oil Corp. *v.* Bass, 283 U. S. 279 109
Grubb *v.* Public Utilities Comm'n, 281 U. S. 470 165, 169
Gulf, C. & S. F. Ry. Co. *v.* Dennis, 224 U. S. 503 347
Gulf, C. & S. F. Ry. Co. *v.* Ellis, 165 U. S. 150 90
Gulf Oil Corp. *v.* Lewellyn, 248 U. S. 71 419, 420
Gulf Smokeless Coal Co. *v.* Sutton, Steele & Steele, 35 F. (2d) 433 435
Gurnsey, Estate of, 177 Cal. 211 226
Gwinn *v.* Commissioner, 287 U. S. 224 577
Haijek & Simecek *v.* Luck, 96 Tex. 157 529, 530
Hale *v.* Henkel, 201 U. S. 43 250
Hall *v.* Geiger-Jones Co., 242 U. S. 539 580
Hall & Young *v.* Railroad Cos., 13 Wall. 367 542

Page.
Hamilton *v.* Rathbone, 175 U. S. 414 83
Hammock *v.* Loan & Trust Co., 105 U. S. 77 83, 344
Hampton & Co. *v.* United States, 276 U. S. 394 334
Hanauer *v.* Doane, 12 Wall. 342 455
Handy & Harman *v.* Burnet, 284 U. S. 136 547
Hannay *v.* Eve, 3 Cranch 242 455
Hardin-Wyandot Co. *v.* Public Utilities Comm'n, 118 Oh. St., 592 499
Hardin-Wyandot Co. *v.* Upper Sandusky, 251 U. S. 173 577
Harkin *v.* Brundage, 276 U. S. 36 355, 356
Harmon *v.* Fishar, Cowp. 117 94
Harris *v.* Jex, 55 N. Y. 421 364
Harris *v.* Pennsylvania R. Co., 50 F. (2d) 866 377
Harrison *v.* United States, 7 F. (2d) 259 482
Hartford Accident & Ind. Co. *v.* Bunn, 285 U. S. 169 161, 569, 599, 658
Hartford Accident & Ind. Co. *v.* Englander, 93 N. J. Eq. 188 541
Hartford Life Ins. Co. *v.* Johnson, 249 U. S. 490 169
Haseltine *v.* Central Bank, 183 U. S. 130 562
Hatfield *v.* Graham, 73 W. Va. 759 396
Hauenstein *v.* Lynham, 100 U. S. 483 77
Haven *v.* Missouri R. Co., 155 Mo. 216 484
Hawaii *v.* Mankichi, 190 U. S. 197 448
Hawley *v.* Gray Bros. Co., 127 Cal. 560 161
Hazelton *v.* Sheckells, 202 U. S. 71 455
Hazelwood *v.* Olinger Bldg. Dep't Stores, 205 Wis. 85 524
Hebert *v.* Louisiana, 272 U. S. 312 52, 67, 570
Page.
Heim *v.* McCall, 239 U. S. 175 276
Henderson *v.* Moore, 5 Cranch 11 481
Henderson Tel. & Tel. Co. *v.* Owensboro Tel. & Tel. Co., 192 Ky. 322 541
Hendrick *v.* Maryland, 235 U. S. 610 572
Hendryx *v.* State, 130 Ind. 265 72
Herencia *v.* Guzman, 219 U. S. 44 485
Herlihy *v.* Donohue, 52 Mont. 601 396
Herold *v.* Commissioner, 42 F. (2d) 942 555
Heydenfeldt *v.* Daney Gold Mining Co., 93 U. S. 634 448
Hickory *v.* United States, 151 U. S. 303 486
Hidekuni Iwata, *Ex parte*, 216 Fed. 610 69
Higginson *v.* Boston, 212 Mass. 583 320
Highland *v.* Russell Car Co., 279 U. S. 253 274, 275
Hilborn *v.* Soale, 44 Cal. App. 115 228
Hill *v.* American Surety Co., 200 U. S. 197 42
Hillis *v.* Sullivan, 48 Mont. 320 347
Hines *v.* Butler, 278 Fed. 877 427
Hipp *v.* Babin, 19 How. 271 95
Hirschi *v.* United States, 67 Ct. Cls. 637 105, 109, 112
Historical Publishing Co. *v.* Jones Bros. Pub. Co., 231 Fed. 638 433
Hitchcock *v.* Caruthers, 100 Cal. 100 161
Hodge Co. *v.* Cincinnati, 284 U. S. 335 264, 276
Hoffmans, The, 171 Fed. 455 428
Hogsett *v.* Thompson, 258 Pa. St. 85 352, 354, 355
Hohorst, *In re*, 150 U. S. 653 434
Hoke *v.* United States, 227 U. S. 308 118
Holden *v.* Hardy, 169 U. S. 366 65, 68, 72

Page.

Holder *v.* United States, 150 U. S. 91 481
Hollandsworth *v.* United States, 34 F. (2d) 423 219
Hollins *v.* Brierfield Coal Co., 150 U. S. 371 356
Holmgren *v.* United States, 217 U. S. 509 482
Holy Trinity Church *v.* United States, 143 U. S. 457 448
Home *v.* Commonwealth, 202 Mass. 422 322
Homer Ramsdell Transp. Co. *v.* LaCompagnie Generale, 182 U. S. 406 566
Home Tel. & Tel. Co. *v.* Los Angeles, 227 U. S. 278 393
Hooker *v.* Knapp, 225 U. S. 302 239
Houck *v.* Drainage Dist., 239 U. S. 254 564
Houston *v.* Southwestern Bell Tel. Co., 259 U. S. 318 497
Houston Oil Co. *v.* Goodrich, 245 U. S. 440 102
Hoven *v.* McCarthy Bros. Co., 163 Minn. 339 364
Hubbard *v.* Mason City, 64 Iowa 245 484
Hulbert *v.* Chicago, 202 U. S. 275 169
Hunicke *v.* Meramec Quarry Co., 262 Mo. 560 376
Hunt *v.* Bank Line, 35 F. (2d) 136 543
Hunt *v.* Wicht, 174 Cal. 205 227
Hunt Co. *v.* Boston Elevated Ry. Co., 199 Mass. 220 175
Hurtado *v.* California, 110 U. S. 516 65
Husty *v.* United States, 282 U. S. 694 623
Hygrade Provision Co. *v.* Sherman, 266 U. S. 497 563
Idaho Power Co. *v.* Thompson, 19 F. (2d) 547 498
Imperial Fire Ins. Co. *v.* Dunham, 117 Pa. 460 100

Page.

Ingram & Royle *v.* Services Maritimes, [1914] 1 K. B. 541 425, 428
Insurance Co. *v.* Bailey, 13 Wall. 616 95
Insurance Co. *v.* Barton, 13 Wall. 603 482
Insurance Co. *v.* Harris, 97 U. S. 331 166
Intermountain Rate Cases, 234 U. S. 476 25, 237
International Navigation Co. *v.* Farr & Bailey Mfg. Co., 181 U. S. 218 426, 427
International News Service *v.* Associated Press, 248 U. S. 215 319
International Ry. Co. *v.* Prendergast, 1 F. Supp. 623 498
International Shoe Co. *v.* Pinkus, 278 U. S. 261 524
Interstate Commerce Comm'n *v.* Waste Merchants Assn., 260 U. S. 32 204, 239
Iowa Central Ry. Co. *v.* Iowa, 160 U. S. 389 570
Iowa-Des Moines Nat. Bank *v.* Bennett, 284 U. S. 239 32, 393
Irons *v.* Bias, 85 W. Va. 493 96
Iroquois, The, 194 U. S. 240 371
Israel *v.* United States, 3 F. (2d) 743 120
Jackman *v.* Rosenbaum Co., 260 U. S. 22 318
Jackson *v.* Commonwealth, 215 Ky. 800 58
Jackson *v.* Old Colony Street Ry., 206 Mass. 477 372
Jacobi *v.* Alabama, 187 U. S. 133 169
Jacobson *v.* Massachusetts, 197 U. S. 11 272, 398, 448
James *v.* Evans, 149 Fed 136 484
Jamison *v.* Encarnacion, 281 U. S. 635 375
Japanese Immigrant Case, 189 U. S. 86 336

Page.
Jarl *v.* United States, 19 F. (2d) 891 444
Jett Bros. Co. *v.* Carrollton, 252 U. S. 1 562, 573
Jianole *v.* United States, 58 F. (2d) 115 220, 222
Johnson *v.* Chapman Milling Co., 37 S. W. (2d) 776 530
Johnson *v.* Franklin, 112 Conn. 228 484
Johnson Transfer Lines *v.* Perry, 47 F. (2d) 900 264
Jollit *v.* United States, 285 Fed. 209 120
Jones, *In re*, 71 W. Va. 567 396
Kansas City Public Service Co. *v.* Ranson, 285 U. S. 528 570
Kansas City Sou. Ry. Co. *v.* Albers Comm'n Co., 223 U. S. 573 398
Kansas City Sou. Ry. Co. *v.* Anderson, 233 U. S. 325 509
Kansas City Sou. Ry. Co. *v.* Interstate Commerce Comm'n, 252 U. S. 178 204
Kansas City Sou. Ry. Co. *v.* Interstate Commerce Comm'n, 6 F. (2d) 692 190
Kansas City Sou. Ry. Co. *v.* United States, 231 U. S. 423 141, 143
Kaplan *v.* United States, 7 F. (2d) 594 120
Kean *v.* Elizabeth, 54 N. J. L. 462 322
Keasbey & Mattison Co., *In re*, 160 U. S. 221 435
Keating *v.* Vaughn, 61 Tex. 518 529
Kelley *v.* Oregon, 273 U. S. 589 69
Kelly *v.* Metropolitan Ry. Co., [1895] 1 Q. B. 944 374
Kennedy *v.* Gibson, 8 Wall. 498 95
Kentucky *v.* Dennison, 24 How. 66 246
Kerr *v.* Clampitt, 95 U. S. 188 481
Kimball *v.* Thompson, 4 Cush. 441 355
Page.
King *v.* Commissioners, 5 A. & E. 804 83
King (C. A.) & Co. *v.* Horton, 276 U. S. 600 575
Kirk *v.* Lawrenson, 24 F. (2d) 64 132
Kirk *v.* Maumee Valley Co., 279 U. S. 797 319
Kirkpatrick *v.* Accident Co., 139 Ia. 370 99
Knights of Pythias *v.* Meyer, 265 U. S. 30 362, 513
Knoxville Iron Co. *v.* Harbison, 183 U. S. 13 274
Knoxville Water Co. *v.* Knoxville, 200 U. S. 22 321
Krentler-Arnold Hinge Last Co., *Ex parte*, 286 U. S. 533 248
Krugsport Press *v.* Brief English Systems, 54 F. (2d) 501 356
Krulikoski *v.* Sparling, 82 Wash. 474 484
Kuhn *v.* Fairmont Coal Co., 215 U. S. 349 365
Kwock Jan Fat *v.* White, 253 U. S. 454 336, 339
Lagonda, The, 44 Fed. 367 175
Langnes *v.* Green, 282 U. S. 531 223, 486
Lansing Boiler Works *v.* Ryerson, 128 Fed. 701 518
Larson *v.* South Dakota, 278 U. S. 429 321
Laughter *v.* United States, 259 Fed. 94 122
Lau Ow Bew *v.* United States, 144 U. S. 47 447
Lavinder, *Ex parte*, 88 W. Va. 713 396
Lavine *v.* California, 286 U. S. 528 563
Layne & Bowler Corp. *v.* Western Well Wks., 261 U. S. 387 102
Layton *v.* Missouri, 187 U. S. 356 169
Lee *v.* Chesapeake & O. Ry. Co., 260 U. S. 653 435
Legal Tender Cases, 12 Wall. 457 272

Page.

Lehigh Valley R. Co. *v.* United States, 243 U. S. 412 238
Leman *v.* Krentler-Arnold Co., 284 U. S. 448 435
Lenox *v.* Insurance Co., 165 Pa. 575 99
Leon & Blum *v.* Welborne, 58 Tex. 157 529
Lewinson *v.* Hobart Trust Co., 49 F. (2d) 356 96
Lewis *v.* Cocks, 23 Wall. 466 95
Lewis *v.* Johnson, 16 F. (2d) 180 340
Lincoln *v.* Power, 151 U. S. 436 481
Lindgren *v.* United States, 281 U. S. 38 371
Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61 396
Lion Bonding Co. *v.* Karatz, 262 U. S. 77 165
Lisansky *v.* United States, 31 F. (2d) 846 122
Live Oak Water Assn. *v.* Railroad Comm'n, 269 U. S. 354 164, 562
Liverpool & G. W. Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397 294, 542, 543
Locke *v.* United States, 15 Fed. Cas. 740 507
Loeb *v.* Columbia Township Trustees, 179 U. S. 472 364
Logan *v.* Davis, 233 U. S. 613 190
Long Sault Development Co. *v.* Call, 242 U. S. 272 577
Los Angeles Brush Corp. *v.* James, 272 U. S. 701 247
Lott *v.* United States, 205 Fed. 28 119
Louis Dreyfus & Co. *v.* Tempus Shipping Co., [1931] A. C. 726 425, 428
Louisiana Navigation Co. *v.* Oyster Comm'n, 226 U. S. 99 562
Louisana Oil Rfg. Corp. *v.* Reed, 38 F. (2d) 159 481
Louisville Gas Co. *v.* Coleman, 277 U. S. 32 570

Page.

Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298 347, 394
Louisville & N. R. Co. *v.* Holloway, 246 U. S. 525 485
Louisville & N. R. Co. *v.* Mottley, 219 U. S. 467 276
Louisville & N. R. Co. *v.* Parker, 287 U. S. 569 161
Louisville & N. R. Co. *v.* United States, 282 U. S. 740 24
Louisville & N. R. Co., *v.* Woodford, 234 U. S. 46 169
Love *v.* People, 160 Ill. 501 442
Lowe *v.* Kansas, 163 U. S. 81 65
Low Wah Suey *v.* Backus, 225 U. S. 460 343
Lucadamo *v.* United States, 280 Fed. 653 443
Lucero, *Ex parte*, 23 N. M. 433 219
Luckenbach *v.* McCahan Sugar Rfg. Co., 248 U. S. 139 429
Luria *v.* United States, 231 U. S. 9 508
Luterman *v.* United States, 281 Fed. 374 443
Luther *v.* Borden, 7 How. 1 399
Lynch *v.* Alworth-Stephens Co., 267 U. S. 364 557, 558
Lynch *v.* Hornby, 247 U. S. 339 420
Lynott *v.* Great Lakes Transit Corp., 202 App. Div. (N. Y.) 613 280
MacKinnon & Co. *v.* Mutual Fire Ins. Co., 89 Ia. 170 99, 100
Mahler *v.* Eby, 264 U. S. 32 339, 480
Maine Motor Coaches *v.* Public Utilities, 125 Me. 63 264
Malcolm Baxter, Jr., The, 277 U. S. 323 331, 428
Malvern & F. V. R. Co. *v.* Chicago, R. I. & P. Ry. Co., 182 Fed. 685 236
Manufacturers Ry. Co. *v.* United States, 246 U. S. 457 238

Page.
Marbury *v.* Madison, 1 Cranch 137 245
Marchant *v.* Pennsylvania R. Co., 153 U. S. 380 317
Marconi Wireless Co. *v.* National E. S. Co., 206 Fed. 295 434
Marine Ins. Co. *v.* Young, 5 Cranch 187 481
Marks *v.* Feldman, L. R. 5 Q. B. 275 94
Marron *v.* United States, 275 U. S. 192 210, 215
Marshall *v.* Holmes. 141 U. S. 589 166
Martin *v.* Mott, 12 Wheat. 19 399
Martin *v.* State, 51 Ga. 567 70
Mason *v.* Cotton Co., 148 N. C. 492 364
Massachusetts, *In re,* 197 U. S. 482 247
Matsutaka v. Carr, 47 F. (2d) 601 132
Matthews *v.* Rodgers, 284 U. S. 521 94, 356
Mattox *v.* United States, 146 U. S. 140 483
Mayer, *Ex parte*, 27 Tex. 715 396
Mayer *v.* Hellman, 91 U. S. 496 526
McArver *v.* State, 114 Ga. 514 58
McCardle *v.* Indianapolis Water Co., 272 U. S. 400 191
McCaughn *v.* Hershey Choccolate Co., 283 U. S. 488 345
McClellan *v.* Carland, 217 U. S. 268 246, 247
McCormick *v.* Page, 96 Ill. App. 447 96
McCoy *v.* Shaw, 277 U. S. 302 571
McCulloch *v.* Maryland, 4 Wheat. 316 272
McDonald, *In re,* 49 Mont. 454 396
McDonald *v.* Oregon Navigation Co., 233 U. S. 665 570
McGrain *v.* Daugherty, 273 U. S. 135 250
McKee *v.* Coffin, 66 Tex. 304 529
McKibbin *v.* Martin, 64 Pa. St. 352 354
McKnight *v.* United States, 252 Fed. 687 122
McLean *v.* Arkansas, 211 U. S. 539 274
Mead *v.* Portland, 200 U. S. 148 319
Means *v.* Dowd, 128 U. S. 273 354, 355
Mediana, The, [1900] A. C. 113 175, 177
Meggott *v.* Mills, 1 Ld. Raym. 286 94
Memphis & Charleston Ry. *v.* Pace, 282 U. S. 241 322
Menges *v.* Dentler, 33 Pa. St. 495 364
Mercer *v.* Ott, 78 W. Va. 629 538
Merchants Loan & Trust Co. *v.* Smietanka, 255 U. S. 509 108
Merchants Nat. Bank v. Richmond, 256 U. S. 635 398
Meredith *v.* Santa Clara Mining Assn., 60 Cal. 617 161
Merrick *v.* Halsey & Co., 242 U. S. 568 580
Metropolitan Business College *v.* Blair, 24 F. (2d) 176 313
Metropolitan Life Ins. Co. *v.* Scott, 160 Miss. 537 99
Metropolitan R. Co. *v.* Moore, 121 U. S. 558 482
Metropolitan Ry. Receivership, *Re,* 208 U. S. 90 356
Meyer *v.* Richmond, 172 U. S. 82 319
Michigan *v.* Michigan Trust Co., 286 U. S. 334 297, 356, 377
Michigan Central R. Co. *v.* Mix, 278 U. S. 492 169
Michigan Comm'n *v* Duke, 266 U. S. 570 266
Miles *v.* State, 58 Ala. 390 122
Miller *v.* Maryland Casualty Co., 40 F. (2d) 463 482
Miller *v.* Miller, 81 Kan. 397 484
Miller *v.* Strahl, 239 U. S. 426 563
Miller *v.* Wilson, 236 U. S. 373 274

Page.
Miller & Lux *v.* Drainage Dist., 256 U. S. 129 564
Milligan, *Ex parte*, 4 Wall. 2 402
Mills *v.* Duryee, 7 Cranch 481 166
Minneapolis & St. L. R. Co. *v.* Bombolis, 241 U. S. 211 280
Minneapolis, St. P. & S. S. M. Ry. Co. *v.* Moquin, 283 U. S. 520 485
Minneapolis Threshing Mach. Co. *v.* Hocking, 54 N. D. 559 288
Minnesota Rate Cases, 230 U. S. 352 497
Missouri *ex rel.* Missouri Ins. Co. *v.* Gehner, 281 U. S. 313 164, 367
Missouri, K. & T. Ry. Co. *v.* Sealy, 248 U. S. 363 169
Missouri Pacific Ry. Co. *v.* Chicago & A. R. Co., 132 U. S. 191 482
Missouri Pacific Ry. Co. *v.* Humes, 115 U. S. 512 90
Missouri Pacific Ry. Co. *v.* Mackey, 127 U. S. 205 90, 509
Missouri Pacific Ry. Co. *v.* Road Improvement Dist., 266 U. S. 187 564
Missouri Pacific Ry. Co. *v.* Taber, 244 U. S. 200 169
Mitchell *v.* Commonwealth, 225 Ky. 83 58
Mitchell *v.* First Nat. Bank, 180 U. S. 471 165
Mitchell *v.* Harmony, 13 Wall. 115 401
Mobile, J. & K. C. R. Co. *v.* Turnipseed, 219 U. S. 35 89, 90, 506, 508, 509, 567
Moch Co. *v.* Rensselaer Water Co., 247 N. Y. 160 374
Montana Bank *v.* Yellowstone County, 276 U. S. 499 364, 365
Montana Horse Products Co. *v.* Great Northern Ry. Co., 91 Mont. 194 360, 366
Montgomery Web Co. *v.* Dienelt, 133 Pa. St. 585 354
Morris *v.* Neumann, 293 Fed. 974 96
Page.
Morse *v.* United States, 267 U. S. 80 250
Mortgage Co. *v.* Yost, 39 Idaho 489 167
Mosher *v.* Phoenix, 7 P. (2d) 622 30
Mowry *v.* Providence, 16 R. I. 422 320
Mowry *v.* Reed, 187 Mass. 174 518
Moyer, *In re*, 35 Colo. 159 396
Moyer *v.* Peabody, 212 U. S. 78 399
Muhlker *v.* Harlem R. Co., 197 U. S. 544 317
Mullen v. State, 28 Okla. Cr. 218 73
Munson S. S. Line *v.* Miramar S. S. Co., 167 Fed. 960 176
Murphy Oil Co. *v.* Burnet, 287 U. S. 299 311, 313, 555, 556, 559
Murphy Oil Co. *v.* Burnet, 55 F. (2d) 17 111
Murray *v.* Chicago & N. W. Ry. Co., 62 Fed. 24 377
Murray's Lessee *v.* Hoboken Land Co., 18 How. 272 65, 335
Myers *v.* United States, 272 U. S. 52 400
Naivette *v.* Philad Co., 54 F. (2d) 623 433
Napa Valley Elec. Co. *v.* Railroad Comm'n, 251 U. S. 366 165
National Exchange Bank *v.* Wiley, 195 U. S. 257 164
National Fire Ins. Co. *v.* Thompson, 281 U. S. 331 566
National Lead Co. *v.* United States, 252 U. S. 140 303
National Union Ins. Co. *v.* Wanberg, 260 U. S. 71 291
Navigazione Libera Triestina *v.* United States, 36 F. (2d) 631 334
Naylor & Norlin *v.* Lewiston & S. E. Elec. Ry. Co., 14 Idaho 722 161
Near *v.* Minnesota, 283 U. S. 697 67
Neil *v.* Flynn Lumber Co., 71 W. Va. 708 372

Page.
Nevada - California - Oregon Ry. Co. *v.* Burrus, 244 U. S. 103 169
Newcomb *v.* Wood, 97 U. S. 581 482
New England Divisions Case, 261 U. S. 184 24, 236
New Haven Steamboat Co. *v.* The Mayor, 36 Fed. 716 177
Newman *v.* United States, 299 Fed. 128 443, 445
New Orleans Water Works *v.* Louisiana Sugar Co., 125 U. S. 18 577
Newton *v.* Commissioners, 100 U. S. 548 318, 319, 321
Newtown Creek Towing Co. *v.* New York City, 23 F. (2d) 486 174
New York, *Matter of,* 190 N. Y. 350 323
New York *v.* United States, 257 U. S. 591 26
New York Central R. Co. *v.* Ambrose, 280 U. S. 486 570
New York Guaranty Co. *v.* Memphis Water Co., 107 U. S. 205 94, 95
New York Life Ins. Co. *v.* Rankin, 162 Fed. 103 480
New York, O. & W. Ry. Co. *v.* United States, 14 F. (2d) 850 240
Nichols *v.* Coolidge, 274 U. S. 531 226, 229
Nixon *v.* Jenkins, 2 H. Bl. 135 94
Noble State Bank *v.* Haskell, 219 U. S. 104 192
Norris *v.* United States, 34 F. (2d) 839 122
Northern Pacific Ry. Co. *v.* North Dakota, 236 U. S. 585 398
Northern Securities Co. *v.* United States, 193 U. S. 197 25
North German Lloyd *v.* Elting, 48 F. (2d) 547 328
North Star, The, 151 Fed. 168 174

Page.
Norwich Ins. Co. *v.* Standard Oil Co., 59 Fed. 984 543
Norwood *v.* Baker, 172 U. S. 269 66
No. 34, The, 25 F. (2d) 602 429
Oates *v.* National Bank, 100 U. S. 239 448
O'Brien *v.* United States, 51 F. (2d) 674, note p. 678 443, 444, 453
Ocean Accident & G. Corp. *v.* Hooker Co., 240 N. Y. 37 544
Oceanic Navigation Co. *v.* Stranahan, 214 U. S. 320 334, 335, 336
Off *v.* Hakes, 142 Fed. 364 96
Ogden *v.* United States, 112 Fed. 523 483
Ogden & Moffett Co. *v.* Public Utilities Comm'n, 286 U. S. 525 566
Ohio *ex rel.* Bryant *v.* Akron Met. Park Dist., 281 U. S. 74 164
Ohio & Miss. Ry. Co. *v.* Early, 141 Ind. 73 376
Ohio Oil Co. *v.* Conway, 281 U. S. 146 399, 570
Ohio Oil Co. *v.* Indiana, 177 U. S. 190 396
Old Colony R. Co. *v.* Commissioner, 284 U. S. 552 108
Older, The, 1 F. Supp. 119 427
O'Leary, *Ex parte,* 53 F. (2d) 956 122
Olek *v.* Fern Rock Woolen Mills, 180 Fed. 117 484
Olmstead *v.* United States, 277 U. S. 438 443, 454
Omaechevarria *v.* Idaho, 246 U. S. 343 563
O'Meara *v.* Commissioner, 34 F. (2d) 390 313
O'Neil *v.* Northern Colorado Irrigation Co., 242 U. S. 20 169
O'Neill *v.* Yellowstone Irrigation Dist. 44 Mont. 492 347
Orient Insurance Co. *v.* Daggs, 172 U. S. 557 291

Page.
Origet *v.* Hedden, 155 U. S. 228 335
Ornstein *v.* Chesapeake & O. Ry. Co., 284 U. S. 572 563
Osceola, The, 189 U. S. 158 371
Pacific Co. *v.* Peterson, 278 U. S. 130 371, 374, 375
Pacific Electric Ry. Co. *v.* Los Angeles, 194 U. S. 112 30
Packard *v.* Banton, 264 U. S. 140 264
Paine *v.* St. Paul Stockyards Co., 35 F. (2d) 624 483
Panama R. Co. *v.* Johnson, 264 U. S. 375 279, 280, 282
Parker *v.* Black, 151 Fed. 18 96
Parker *v.* Sherman, 212 Fed. 917 96
Parker *v.* Winnipiseogee Lake Co., 2 Black 545 95
Parkerson *v.* Borst, 251 Fed. 242 97
Passavant *v.* United States, 148 U. S. 214 334, 335
Patrone *v.* Howlett, 237 N. Y. 394 280
Patterson *v.* Bark Eudora, 190 U. S. 169 291
Patterson *v.* Colorado, 205 U. S. 454 505
Patton *v.* United States, 42 F. (2d) 68 444
Patty-Joiner & Eubank Co. *v.* Cummins, 93 Tex. 598 529, 530
Pearce *v.* Twichell, 41 Miss. 344 543
Pease *v.* Rathbun-Jones Co., 243 U. S. 273 161
Pendleton *v.* Benner Line, 246 U. S. 353 429
Pennsylvania R. Co., *In re*, 48 F. (2d) 559 429
Pennsylvania R. Co. *v.* International Coal Co., 230 U. S. 184 83
People *v.* Dudley, 173 Mich. 389 220, 222
People *v.* Ficke, 343 Ill. 367 441
People *v.* Goldenson, 76 Cal. 328 72
Page.
People *v.* McCord, 76 Mich. 200 442
People *v.* Mills, 178 N. Y. 274 441, 444
People *v.* Napthaly, 105 Cal. 641 70
People *v.* Sanders, 64 Cal. App. 1 220, 222
People *v.* Sapienzo, 60 Cal. App. 626 220
People *ex rel.* Burgess *v.* Risley, 66 How. Pr. (N. Y.) 67 57, 58
People *ex rel.* Estate *v.* Tax Comm'n, 200 App. Div. 272 517
People *ex rel.* Forsyth *v.* Court, 141 N. Y. 288 220
People *ex rel.* Pasco *v.* Trombly, 173 App. Div. (N. Y.) 497 220, 222
People *ex rel.* Woodin *v.* Ottaway, 247 N. Y. 493 220
People's Bank *v.* McAleer, 204 Ala. 101 96
People's Transit Co. *v.* Henshaw, 20 F. (2d) 87 264
Perkins *v.* Brown, 132 Tenn. 294 175
Peterson *v.* Chicago, R. I. & P. Ry. Co., 205 U. S. 364 420
Peterson *v.* United States, 255 Fed. 433 443
Phelps *v.* Mayer, 15 How. 160 486
Philippides *v.* Day, 283 U. S. 48 132
Phillips *v.* Commissioner, 283 U. S. 589 168
Phillips *v.* Dime Trust & S. D. Co., 284 U. S. 160 226
Phillips & Colby Co. *v.* Seymour, 91 U. S. 646 91
Pickett *v.* United States, 216 U. S. 456 481
Piedmont & Northern Ry. Co. *v.* United States, 280 U. S. 469 240
Pierce *v.* United States, 255 U. S. 398 480
Pittsburgh & W. Va. Ry. Co. *v.* United States, 281 U. S. 479 20, 29

Page.
Plant, *In re*, 148 Fed. 37 96
Plumstead Board *v.* Spackman, L. R. 13 Q. B. D. 878 448
Plunkett v. Miller, 161 Ga. 466 219
Plymouth Coal Co. *v.* Pennsylvania, 232 U. S. 531 85
Pobreslo *v.* Joseph M. Boyd Co., 287 U. S. 518 530
Poe *v.* Seaborn, 282 U. S. 101 110
Poleric, The, 17 F. (2d) 513 428
Pollard *v.* Bailey, 20 Wall. 520 345
Pomeroy's Lessee *v.* Bank, 1 Wall. 592 482
Pond *v.* New York Nat. Exch. Bank, 124 Fed. 992 96
Potter *v.* Maybury, 284 U. S. 593 571
Price *v.* Thompson, 48 Mo. 361 320
Price *v.* United States, 165 U. S. 311 441
Procter & Gamble Co. *v.* United States, 225 U. S. 282 235, 238, 239
Providence, The, 98 Fed. 133 177
Pugh *v.* Bluff City Ex. Co., 177 Fed. 399 484, 487
Pullman Car. Co. *v.* Missouri Pac. Ry. Co., 115 U. S. 587 420
Pusey & Jones Co. *v.* Hanssen, 261 U. S. 491 356
Queen *v.* Instan, [1893] 1 Q. B. 450 373
Queen *v.* Tyrrell, [1894] 1 Q. B. 710 123
Queen *v.* Whitchurch, 24 Q. B. D. 420 122
Quinn *v.* Dougherty, 30 F. (2d) 749 316, 320
Raasch *v.* Elite Laundry Co., 98 Minn. 357 376
Radio Corporation *v.* Bunnell & Co., 298 Fed. 62 433
Railroad Comm'n *v.* Southern Pac. Co., 264 U. S. 331 25
Railroad Co., *Ex parte*, 95 U. S. 221 432

Page.
Railroad Co. *v.* Fraloff, 100 U. S. 24 481
Railroad Co. *v.* Georgia, 98 U. S. 359 23
Railroad Co. *v.* Lockwood, 17 Wall. 357 294
Railway Co. *v.* Heck, 102 U. S. 120 482
Railway Co. *v.* Twombly, 100 U. S. 78 481
Ralli *v.* Troop, 157 U. S. 386 462
Rapid Transit, The, 52 Fed. 320 427
Rauen *v.* Insurance Co., 129 Ia. 725 99
Reed *v.* Guaranty Security Corp., 291 Fed. 580 96
Regina *v.* Fletcher, 8 Cox C. C. 131 442
Regina *v.* Johnson, Car. & Mar. 218 442
Regina *v.* Williams, 1 Car. & K. 195 441
Reichling *v.* Covington Lumber Co., 57 Wash. 225 320
Reinecke *v.* Northern Trust Co., 278 U. S. 339 229
Reliable Incubator Co. *v.* Stahl, 105 Fed. 663 480
Reliance Coal Co. *v.* Brydon & Bro., 286 Fed. 827 480
Relief Fire Ins. Co. *v.* Shaw, 94 U. S. 574 99
Reliford *v.* State, 140 Ga. 777 58, 59
Rex *v.* Egginton, 2 Leach C. C. 913 442
Rex *v.* McDaniel, Frost. 121 442
Rex *v.* Titley, 14 Cox C. C. 502 444
Reynes *v.* Dumont, 130 U. S. 354 96
Rich *v.* New York Cent. & H. R. R. Co., 87 N. Y. 382 372
Richards *v.* Washington Terminal Co., 233 U. S. 546 319
Richardson *v.* Commonwealth, 131 Va. 802 220, 222
Richardson *v.* Harmon, 222 U. S. 96 429
Riggins, *Ex parte*, 134 Fed. 404 70

Page.
Riggs *v.* United States, 14 F. (2d) 5 219
Ritter *v.* United States, 293 Fed. 187 443
Riverside *v.* MacLain, 210 Ill. 308 320
Robertson *v.* Baldwin, 165 U. S. 275 282, 377
Robertson *v.* Pioneer Gas Co., 173 La. 313 555
Robinson *v.* United States, 32 F. (2d) 505 444
Rodrigues *v.* Transmarine Corp., 216 App. Div. (N. Y.) 337 280
Roe v. Kansas, 278 U. S. 191 92, 595
Rogers *v.* Peck, 199 U. S. 425 52
Roof *v.* Chattanooga Pulley Co., 36 Fla. 284 543
Rooker *v.* Fidelity Trust Co., 261 U. S. 114 562
Rosen *v.* United States, 161 U. S. 29 441
Rosenthal *v.* Heller, 266 Fed. 563 96
Royal Exchange Assurance *v.* Navigation Co., [1923] A. C. 235 425
Rust *v.* Cooper, Cowp. 629 94
Sage *v.* United States, 250 U. S. 53 312
St. Louis, I. M. & S. Ry. Co. *v.* Commercial Union Ins. Co., 139 U. S. 223 542
St. Louis, I. M. & S. Ry. Co. *v.* Craft, 237 U. S. 648 485
St. Louis & O'Fallon Ry. Co. *v.* United States, 279 U. S. 461 194
St. Louis & S. F. Ry. Co. *v.* Mathews, 165 U. S. 1 90
St. Louis S. W. Ry. Co. *v.* Bolinger & Co., 17 F. (2d) 924 236
Saltonstall *v.* Saltonstall, 276 U. S. 260 229
Sam Yick *v.* United States, 240 Fed. 60 443
Sanchez *v.* State, 199 Ind. 235 58
San Diego Land Co. *v.* National City, 174 U. S. 739 66
Page.
Santa Fe, P. & P. Ry. Co. *v.* Grant Bros. Co., 228 U. S. 177 294
Saunders *v.* People, 38 Mich. 218 442
Saunders *v.* Shaw, 244 U. S. 317 164
Scarff *v.* Metcalf, 107 N. Y. 211 377
Schlosser *v.* Hemphill, 198 U. S. 173 562
Scott *v.* Neely, 140 U. S. 106 356
Scranton *v.* Wheeler, 179 U. S. 141 319
Scudamore, *Ex parte*, 3 Ves. 85 94
Seaboard Air Line *v.* Seegers, 207 U. S. 73 509
Sears *v.* Street Comm'rs, 180 Mass. 274 323
Seattle Land & Imp. Co. *v.* Seattle, 37 Wash. 274 320
Second Employers' Liability Cases, 223 U. S. 1 280
Sessler *v.* Nemcof, 183 Fed. 656 95
Shaffer *v.* Territory, 14 Ariz. 329 59
Shannon & Nugent *v.* Commonwealth, 14 Pa. St. 226 122
Sharp *v.* United States, 191 U. S. 341 319
Shaw *v.* Chicago, M. & St. P. Ry. Co., 103 Minn. 8 376
Sheffield & T. St. Ry. Co. *v.* Rand, 83 Ala. 294 320
Sheppard *v.* State, 165 Ga. 460 58, 70
Shipping Board *v.* Greenwald, 16 F. (2d) 948 376
Shumake *v.* Shumake, 17 Idaho 649 167
Sievers, *In re*, 91 Fed. 366 526
Siler *v.* Louisville & N. R. Co., 213 U. S. 175 394
Silk *v.* United States, 16 F. (2d) 568 443
Simmons *v.* United States, 18 F. (2d) 85 126
Simon *v.* Southern Ry. Co., 236 U. S. 115 164

Page.
Simpson *v.* Western Hardware Co., 227 Fed. 304 96
Sinclair Navigation Co., Petition of, 27 F. (2d) 606 427
Singer Sewing Machine Co. *v.* Brickell, 233 U. S. 304 566
Slocum *v.* New York Life Ins. Co., 228 U. S. 364 480
Sloman *v.* Security Trust Co., 281 U. S. 704 580
Smietanka *v.* Indiana Steel Co., 257 U. S. 1 312
Smiley *v.* Holm, 285 U. S. 355 7
Smith *v.* Boston, 7 Cush. 254 319
Smith *v.* Cahoon, 283 U. S. 553 238
Smith *v.* Illinois Bell Tel. Co., 282 U. S. 133 497, 502
Smith *v.* Payne, 6 D. & E. 152 94
Smith *v.* Washington, 20 How. 135 319
Smyth *v.* Ames, 169 U. S. 466 66, 194
Snyder *v.* Portland Ry., L. & P. Co., 107 Ore. 673 484
Soerstad, The, 257 Fed. 130 429
Sooy *v.* Commissioner, 40 F. (2d) 634 313
South Carolina Power Co. *v.* Tax Comm'n, 286 U. S. 525 566
South Covington & C. St. Ry. Co. *v.* Newport, 259 U. S. 97 30
Southern Motorways *v.* Perry, 39 F. (2d) 145 264
Southern Pacific Co. *v.* Interstate Commerce Comm'n, 219 U. S. 433 240
Southern Pacific Co. *v.* Lowe, 247 U. S. 330 108, 419, 420
Southern Power Co. *v.* Public Service Co., 263 U. S. 508 102
Southern Ry. Co. *v.* Bennett, 233 U. S. 80 483, 485
Southern Ry. Co. *v.* Cochran, 56 F. (2d) 1019 281
Southern Ry. Co. *v.* King, 217 U. S. 524 509
Page.
Southern Ry. Co. *v.* Moore, 284 U. S. 581 570
Southern Ry. Co. *v.* St. Louis Hay Co., 214 U. S. 297 240
Southern Ry. Co. *v.* Walters, 47 F. (2d) 3 481
Southern Ry. Co. *v.* Watts, 260 U. S. 519 347
Spannuth *v.* Cleveland, C., C. & St. L. Ry. Co., 196 Ind. 379 484
Sparrow *v.* Strong, 3 Wall. 97 482
Spies *v.* Illinois, 123 U. S. 131 169
Spring Drug Co. *v.* United States, 12 F. (2d) 852 457
Springer *v.* United States, 102 U. S. 586 482
Sproles *v.* Binford, 286 U. S. 374 272, 274, 276, 278, 393, 563, 572, 580
Standard Oil Co. *v.* Marysville, 279 U. S. 582 399
Standard Oil Co. *v.* Southern Pacific Co., 268 U. S. 146 176
Standard Oil Co. *v.* United States, 283 U. S. 235 238
Stanton *v.* Baltic Mining Co., 240 U. S. 103 108
Stanwood *v.* Malden, 157 Mass. 17 319
Star *v.* Johnson, 44 S. W. (2d) 429 526
State *v.* Adams, 115 N. C. 775 442
State *v.* Briggs, 58 W. Va. 291 71
State *v.* Collins, 104 La. 629 58
State *v.* Ferris, 16 La. Ann. 424 71
State *v.* Gibbs, 109 Minn. 247 444
State *v.* Hardin, 183 N. C. 815 219
State *v.* Johnson, 75 Mont. 240 347
State *v.* Law, 189 Iowa 910 122
State *v.* Miller, 122 S. C. 468 220
State *v.* Moore, 61 Kan. 732 70
State *v.* O'Neal, 147 Wash. 169 219
State *v.* Pool, 50 La. Ann. 449 58

Page.
State *v.* Rippey, 127 S. C. 550 444
State *v.* Simpson, 38 La. Ann. 23 71
State *v.* Smith, 152 N. C. 798 444
State *v.* Sparks, 27 Tex. 627 396
State *v.* Sullivan, 127 S. C. 186 220
State *v.* Teahan, 50 Conn. 92 119
State *v.* Zolantakis, 70 Utah 296 219
State Budget Comm'n *v.* Lebus, 244 Ky. 700 11
State *ex rel.* Durner *v.* Huegin, 110 Wis. 189 122
State *ex rel.* Kellogg *v.* District Court, 13 Mont. 370 347
State *ex rel.* Mays *v.* Brown, 71 W. Va. 519 396
State *ex rel.* Sullivan *v.* Tazwell, 123 Ore. 326 280
State *ex rel.* Tucker *v.* Davis, 9 Okla. Cr. 94 58
State Tax Comm'rs *v.* Jackson, 283 U. S. 527 566, 570
Steele *v.* Drummond, 275 U. S. 199 288
Steele *v.* United States, 267 U. S. 498 128
Stellwagen *v.* Clum, 245 U. S. 605 526
Stephens *v.* Cherokee Nation, 174 U. S. 445 83
Stephenson *v.* State, 4 Oh. App. 128 72
Stern's Appeal, 64 Pa. St. 447 354
Stetson *v.* Stindt, 279 Fed. 209 483
Stevens *v.* The White City, 285 U. S. 195 294
Stevens *v.* United States, 29 F. (2d) 904 472
Stone *v.* Myers, 9 Minn. 303 518
Storaasli *v.* Minnesota, 283 U. S. 57 572
Story Parchment Co. *v.* Paterson Co., 282 U. S. 555 486
Page.
Strathdon, The, 101 Fed. 600 428
Straton *v.* New, 283 U. S. 318 526
Stratton *v.* St. Louis S. W. Ry. Co., 282 U. S. 10 393
Stratton's Independence *v.* Howbert, 231 U. S. 399 107, 111
Stromberg *v.* California, 283 U. S. 359 67
Styria, The, 186 U. S. 1 223
Sugarman *v.* United States, 249 U. S. 182 92
Sunburst Oil & Rfg. Co. *v.* Great Northern Ry. Co., 91 Mont. 216 360
Susquehanna, The, [1926] A. C. 655 174, 176, 177
Susquehanna Power Co. *v.* Tax Comm'n, 283 U. S. 291 322
Syracuse, The, 12 Wall. 167 295
Tang Tun *v.* Edsell, 223 U. S. 673 336, 338
Tapack *v.* United States, 220 Fed. 445 120
Tarnowski, *Re*, 191 Wis. 279 523
Taylor *v.* Voss, 271 U. S. 176 95
Terrace *v.* Thompson, 263 U. S. 197 393
Texas & Pacific Ry. Co. *v.* Gulf, C. & S. F. Ry. Co., 270 U. S. 266 25
Texas & Pacific Ry. Co. *v.* United States, 286 U. S. 285 146
Thayer *v.* Boston, 206 Fed. 969 322
Thomas *v.* United States, 156 Fed. 897 122
Thompson *v.* Freeman, 1 D. & E. 155 94
Thomson *v.* Crane, 73 Fed. 327 518
Tidal Oil Co. *v.* Flanagan, 263 U. S. 444 364, 365, 505, 567
Tisi *v.* Tod, 264 U. S. 131 343
Tod *v.* Waldman, 266 U. S. 113 339
Toledo Scale Co. *v.* Computing Scale Co., 281 Fed. 488 161
Tracy *v.* Tuffly, 134 U. S. 206 528

Page.
Travelers Ins. Co. *v.* Brass Goods Mfg. Co., 239 N. Y. 273 538
Travelers Ins. Co. *v.* Great Lakes Engineering Co., 184 Fed. 426 542, 543
Trist *v.* Child, 21 Wall. 441 455
Truax *v.* Corrigan, 257 U. S. 312 90
Truax *v.* Raich, 239 U. S. 33 393
Trustees *v.* Brooklyn Fire Ins. Co., 19 N. Y. 305 99
Turman, *Ex parte*, 26 Tex. 708 396
Turner *v.* Schaeffer, 249 Fed. 654 96
Tweed's Case, 16 Wall. 504 507
Twin City Co. *v.* Harding Glass Co., 283 U. S. 353 288
Twining *v.* New Jersey, 211 U. S. 78 65, 67
Tyler *v.* United States, 281 U. S. 497 110, 227, 229, 577
Tyrrell *v.* District of Columbia, 243 U. S. 1 102
Union Bridge Co. *v.* United States, 204 U. S. 364 276
Union Pacific R. Co. *v.* Chicago, R. I. & P. Ry. Co., [illegible] U. S. 564 193
Union Pacific R. Co. *v.* Hadley, 246 U. S. 330 485
Union Pacific R. Co. *v.* Mason City & F. D. R. Co., 222 U. S. 237 193
Union Pacific R. Co. *v.* Public Service Comm'n, 248 U. S. 67 398
Union Trust Co. *v.* Wardell, 258 U. S. 537 312
United Drug Co. *v.* Washburn, 284 U. S. 598 566
United Fuel Gas Co. *v.* Public Service Comm'n, 278 U. S. 322 497, 565
United Fuel Gas Co. *v.* Public Service Comm'n, 14 F. (2d) 209 498
United Fuel Gas Co. *v.* Railroad Comm'n, 278 U. S. 300 497
Page.
United Fuel Gas Co. *v.* Railroad Comm'n, 13 F. (2d) 510 498
United Press Assn. *v.* National Newspapers Assn., 254 Fed. 284 484
United Railways *v.* West, 280 U. S. 234 501
United States, *Ex parte*, 242 U. S. 27 250, 449, 458
United States *v.* Abilene & Sou. Ry. Co., 265 U. S. 274 237
United States *v.* Acker, 35 F. (2d) 646 472
United States *v.* Adams, 59 Fed. 674 443
United States *v.* Allen, 33 F. (2d) 888 472
United States *v.* American Ry. Express Co., 265 U. S. 425 486
United States *v.* American Tobacco Co., 166 U. S. 468 542
United States *v.* Andrews, 43 F. (2d) 80 472
United States *v.* Atlanta, B. & C. R. Co., 282 U. S. 522 240
United States *v.* Barker, 36 F. (2d) 556 472
United States *v.* Barlow, 132 U. S. 271 152
United States *v.* Bitter Root Co., 200 U. S. 451 95
United States *v.* Biwabik Mining Co., 247 U. S. 116 108, 557
United States *v.* Brewer, 139 U. S. 278 82
United States *v.* Butterworth-Judson Corp., 269 U. S. 504 356
United States *v.* Buzard, 33 F. (2d) 883 472
United States *v.* Charbonnier, 45 F. (2d) 174 427
United States *v.* Chemical Foundation, 272 U. S. 1 448
United States *v.* Childs, 266 U. S. 304 110
United States *v.* Cohen Grocery Co., 255 U. S. 81 81

	Page.
United States *v.* Cross, 33 F. (2d) 887	472
United States *v.* Dietrich, 126 Fed. 664	122, 123
United States *v.* Eehols, 253 Fed. 862	443, 457
United States *v.* Farrar, 281 U. S. 624	119
United States *v.* Golden, 34 F. (2d) 367	472
United States *v.* Gradwell, 243 U. S. 476	120
United States *v.* Grimaud, 220 U. S. 506	85
United States *v.* Guaranty Trust Co., 280 U. S. 478	146
United States *v.* Hartwell, 6 Wall. 385	83
United States *v.* Healy, 202 Fed. 349	442, 457
United States *v.* Hodge, 6 How. 279	482
United States *v.* Holte, 236 U. S. 140	116, 117, 120, 122
United States *v.* Hudson, 7 Cranch 32	120
United States *v.* Illinois Central R. Co., 244 U. S. 82	240
United States *v.* Jackson, 280 U. S. 183	24
United States *v.* Jin Fuey Moy, 241 U. S. 394	448
United States *v.* John Barth Co., 279 U. S. 370	39, 42, 44
United States *v.* Johnston, 124 U. S. 236	84
United States *v.* Katz, 271 U. S. 354	122, 447
United States *v.* Kirby, 7 Wall. 482	446
United States *v.* Knowles, 4 Sawy. 517	377
United States *v.* Kusnierz, 33 F. (2d) 887	472
United States *v.* Lacher, 134 U. S. 624	83
United States *v.* La Franca, 282 U. S. 568	82
United States *v.* Lefkowitz, 285 U. S. 452	210
United States *v.* Lexington Mill Co., 232 U. S. 399	84
United States *v.* Loan & Bldg. Co., 278 U. S. 55	110
United States *v.* Los Angeles & S. L. R. Co., 273 U. S. 299	204, 235, 240
United States *v.* Lynch, 256 Fed. 983	443
United States *v.* Martin, 4 Cliff. 156	121
United States *v.* Martin Hotel Co., 59 F. (2d) 549	44
United States *v.* Mayer, 235 U. S. 55	574
United States *v.* Merriam, 263 U. S. 179	108
United States *v.* Missouri Pac. R. Co., 278 U. S. 269	155
United States *v.* Moore, 95 U. S. 760	190
United States *v.* Mulligan, 48 F. (2d) 93	220, 222
United States *v.* Murray, 275 U. S. 347	220
United States *v.* New River Collieries Co., 262 U. S. 341	323
United States *v.* New River Co., 265 U. S. 533	237
United States *v.* New York Cent. & H. R. R. Co., 146 Fed. 298	122
United States *v.* Oregon & Cal. R. Co., 164 U. S. 526	83
United States *v.* Palmer, 3 Wheat. 610	446
United States *v.* Pappagoda, 288 Fed. 214	443, 457
United States *v.* Phellis, 257 U. S. 156	420
United States *v.* Rabinowich, 238 U. S. 78	120, 121
United States *v.* Reisenweber, 288 Fed. 520	441
United States *v.* River Rouge Co., 269 U. S. 411	323
United States *v.* Russell, 13 Wall. 623	401
United States *v.* Sager, 49 F. (2d) 725	122
United States *v.* Schweppe, 38 F. (2d) 595	472

Page.
United States *v.* Shreveport Grain & El. Co., 287 U. S. 77 344
United States *v.* Standard Brewery, 251 U. S. 210 82
United States *v.* Stevens, 44 Fed. 132 121
United States *v.* Tennessee & C. R. Co., 176 U. S. 242 480
United States *v.* Thompson, 251 U. S. 407 250
United States *v.* Washington, 20 F. (2d) 160 444
United States *v.* Welch, 217 U. S. 333 320
United States *v.* Whittier, 5 Dill. 35 442
United States *v.* Worley, 281 U. S. 339 574
U. S. Expansion Bolt Co. *v.* Kroncke Co., 216 Fed. 186 434
U. S. *ex rel.* Claussen *v.* Day, 279 U. S. 398 132, 133
U. S. *ex rel.* Hassel *v.* Mathues, 22 F. (2d) 979 444, 457
U. S. *ex rel.* Iorio v. Day, 34 F. (2d) 920 336
U. S. *ex rel.* Norwegian Nitrogen Co. *v.* Tariff Comm'n, 274 U. S. 106 576
U. S. *ex rel.* Redfield *v.* Windom, 137 U. S. 636 203
U. S. *ex rel.* Spinosa *v.* Curran, 4 F. (2d) 613, aff'd 4 F. (2d) 614 329
U. S. *ex rel.* Stapf *v.* Corsi, 54 F. (2d) 1086 132
U. S. Fidelity & G. Co. *v.* Centropolis Bank, 17 F. (2d) 913 518
U. S. Fidelity & G. Co. *v.* Ft. Misery Highway Dist., 22 F. (2d) 369 161
U. S. Fidelity & G. Co. *v.* Graham & Norton Co., 254 N. Y. 50 540, 543
United Surety Co. *v.* American Fruit Product Co., 238 U. S. 140 168
Untermyer *v.* Anderson, 276 U. S. 440 229
Page.
Utah Power & L. Co. *v.* Pfost, 286 U. S. 165 277, 500
Utica Knitting Co. *v.* United States, 68 Ct. Cls. 77 546
Vajtauer *v.* Commissioner, 273 U. S. 103 336, 338, 343
Van Camp & Sons *v.* American Can Co., 278 U. S. 245 83
Vanek *v.* Chicago G. W. R. Co., 252 Fed. 871 484
Vannata *v.* United States, 289 Fed. 424 122
Van Stone *v.* Stillwell & Bierce Mfg. Co., 142 U. S. 128 481
Veazie Bank *v.* Fenno, 8 Wall. 533 272
Victor Talking Mach. Co. *v.* Brunswick-Balke-Collender Co., 279 Fed. 758 434
Vincennes Water Supply Co. *v.* Public Service Comm'n, 34 F. (2d) 5 500
Virginia Carolina Co. *v.* Norfolk Shipping Co., [1912] 1 K. B. 229 425, 428
Virginian Ry. Co. *v.* United States, 272 U. S. 658 29
Voccaro *v.* Collier, 38 F. (2d) 862 444
Vogelstein & Co. *v.* United States, 262 U. S. 337 323
Von Baumbach *v.* Sargent Land Co., 242 U. S. 503 107, 108, 110
Voves *v.* United States, 249 Fed. 191 442
Wabash R. Co. *v.* Flannigan, 192 U. S. 29 92, 567, 572, 575
Wabash Ry. Co. *v.* McDaniels, 107 U. S. 454 481
Wabash, St. L. & P. Ry. Co. *v.* Illinois, 118 U. S. 557 497
Waggoner Estate *v.* Wichita County, 273 U. S. 113 394
Wagner *v.* United States, 8 F. (2d) 581 128
Walker *v.* Transportation Co., 3 Wall. 150 425
Waller *v.* Commissioner, 40 F. (2d) 892 555
Walls *v.* Midland Carbon Co., 254 U. S. 300 396

Page.
Ward *v.* Erie R. Co., 230 N. Y. 230 377
Ward Baking Co. *v.* Weber Bros., 230 Fed. 142 433
Warmath *v.* O'Daniel, 159 Fed. 87 95
Warner *v.* Norton, 20 How. 448 482
Washington Fire Relief Assn. *v.* Albro, 130 Wash. 114 99
Washington-Southern Co. *v.* Baltimore Co., 263 U. S. 629 434
Waters-Pierce Oil Co. *v.* Texas (No. 1), 212 U. S. 86 563, 580
Watts, Watts & Co. *v.* Unione Austriaca, 248 U. S. 9 176
Wavle *v.* Wavle, 9 Hun 125 484
Weaver *v.* Palmer Bros. Co., 270 U. S. 402 290, 297
Weber *v.* State, 58 Oh. St. 616 219
Weedin *v.* Okada, 2 F. (2d) 321 132
Weems *v.* United States, 217 U. S. 349 480
Weiss *v.* Weiner, 279 U. S. 333 110
Weksler *v.* Collins, 317 Ill. 132 264
Wells *v.* Commissioner, 286 U. S. 529 574
Wells Fargo & Co. *v.* Taylor, 254 U. S. 175 166
West Co. *v.* Lea, 174 U. S. 590 526
Western & Atlantic R. Co. *v.* Henderson, 279 U. S. 639 89, 506, 508
Western Fuel Co. *v.* Garcia, 257 U. S. 233 371
White *v.* Johnson, 282 U. S. 367 574
Whitehead *v.* Shattuck, 138 U. S. 146 95
Whitehouse *v.* Bolster, 95 Me. 458 518
Whitfield *v.* Aetna Ins. Co., 205 U. S. 489 291
Whitfield *v.* Hanges, 222 Fed. 745 336

Page.
Whitney *v.* New York, 96 N. Y. 240 319, 320, 322, 323
Wienbroer *v.* Shipping Board, 299 Fed. 972 280
Wilbur *v.* U. S. *ex rel.* Kadrie, 281 U. S. 206 203, 204
Wildcroft, The, 201 U. S. 378 426
Williams *v.* Commonwealth, 110 S. W. 339 73
Williams *v.* Georgia, 55 Ga. 391 442
Williams *v.* State, 163 Ark. 623 72
Williams *v.* State, 162 Ga. 327 219
Williamson *v.* Osenton, 220 Fed. 653 482
Williams S. S. Co. *v.* Wilbur, 9 F. (2d) 622 427
Wilson *v.* Everett, 139 U. S. 616 485
Wilson *v.* Lambert, 168, U. S. 611 321, 322
Winters *v.* Ethell, 132 U. S. 207 432
Wisconsin Central R. Co. *v.* United States, 164 U. S. 190 153
Wisconsin R. R. Comm'n *v.* Chicago, B. & Q. R. Co., 257 U. S. 563 83
Wiswall *v.* Sampson, 14 How. 52 357
Wolsum, The, 14 F. (2d) 371 174
Wood *v.* Broom, 287 U. S. 1 576
Woolfolk *v.* United States, 44 F. (2d) 701 472
Woo Wai *v.* United States, 223 Fed. 412 443
Work *v.* Mosier, 261 U. S. 352 112
Workmen's Compensation Exchange *v.* Chicago, M., St. P. & P. R. Co., 45 F. (2d) 885 542
Wright *v.* Walcott, 238 Mass. 432 320
Ybor *v.* United States, 31 F. (2d) 42 444

	Page.
Yee Hem *v.* United States, 268 U. S. 178	508
Yeend *v.* Weeks, 104 Ala. 331	518
Yerger, *Ex parte*, 8 Wall. 85	94
York *v.* Texas, 137 U. S. 15	168
Young, *Ex parte*, 209 U. S. 123	393
Yungay, The, 58 F. (2d) 352	428
Zacharie *v.* Franklin, 12 Pet. 151	482
Zahn *v.* Board of Public Works, 274 U. S. 325	272
Zakonaite *v.* Wolf, 226 U. S. 272	334, 338, 343
Zirpola *v.* Casselman, 237 N. Y. 367	540
Zucht *v.* King, 260 U. S. 174	92
Zucker *v.* United States, 288 Fed. 12	443

TABLE OF STATUTES
Cited in Opinions

(A) Statutes of the United States

	Page.
1789, Sept. 24, c. 20, § 22, 1 Stat. 84	481
1790, Apr. 30, c. 9, § 8, 1 Stat. 112	446
1790, May 26, c. 11, 1 Stat. 122	166
1804, Mar. 27, c. 56, § 2, 2 Stat. 298	166
1825, Mar. 3, c. 64, 4 Stat. 102, 104	446
1842, June 25, c. 47, § 2, 5 Stat. 491	6
1851, Mar. 3, c. 43, § 1, 9 Stat. 635	424
1851, Mar. 3, c. 43, § 3, 9 Stat. 635	429
1867, Mar. 2, c. 169, § 30, 14 Stat. 471	120
1872, Feb. 2, c. 11, § 2, 17 Stat. 28	6
1882, Feb. 25, c. 20, § 3, 22 Stat. 5	6
1884, June 26, c. 121, § 18, 23 Stat. 53	429
1887, Feb. 4, c. 104, § 20, 24 Stat. 386	140
1890, Sept. 27, c. 1001, 26 Stat. 492	317
1890, Sept. 27, c. 1001, §§ 3, 6, 26 Stat. 492	318
1891, Feb. 7, c. 116, §§ 3, 4, 26 Stat. 735	6
1893, Feb. 13, c. 105, § 3, 27 Stat. 445	426
1893, Feb. 13, c. 105, § 6, 27 Stat. 445	427
1898, July 1, c. 541, 30 Stat. 544, 566	526
1901, Jan. 16, c. 93, §§ 3, 4, 31 Stat. 733	6
1903, Mar. 3, c. 1012, § 9, 32 Stat. 1213	337
1906, June 29, c. 3591, § 7, 34 Stat. 593	140
1906, June 30, c. 3915, 34 Stat. 768	80
1907, Feb. 20, c. 1134, § 9, 34 Stat. 898	337
1907, Mar. 2, c. 2564, 34 Stat. 1246	246
1908, Apr. 22, c. 149, § 1, 35 Stat. 65	376
1910, Mar. 26, c. 128, § 2, 36 Stat. 263	345
1910, June 25, c. 395, 36 Stat. 825	115
1910, June 25, c. 395, §§ 2, 3, 36 Stat. 825	118
1911, Aug. 8, c. 5, § 3, 37 Stat. 13	4, 8
1913, Mar. 1, c. 92, 37 Stat. 701	140
1913, Mar. 1, c. 92, § 19a, 37 Stat. 701	184, 188
1913, Mar. 3, c. 117, 37 Stat. 732	81
1913, Oct. 22, c. 32, 38 Stat. 208	230
1915, Mar. 4, c. 153, 38 Stat. 1164	282
1916, Sept. 8, c. 463, § 12, 39 Stat. 756	548
1916, Sept. 8, c. 463, § 12a, 39 Stat. 756	557
1917, Feb. 5, c. 29, § 9, 39 Stat. 874	331, 337
1917, Feb. 5, c. 29, § 19, 39 Stat. 874	342, 343
1917, Feb. 5, c. 29, §§ 32, 34, 39 Stat. 874	131

Page.

1917, June 15, c. 30, Title XI, 40 Stat. 217..... 209, 213
1917, June 15, c. 30, Title XI, §§ 4, 5, 6, 40 Stat. 217. 210
1917, Oct. 3, c. 63, § 206, 40 Stat. 300..... 548
1917, Oct. 3, c. 63, Title II, 40 Stat. 300..... 546
1918, July 1, c. 113, 40 Stat. 634, 683..... 281
1919, Feb. 24, c. 18, § 234 (a) (9), 40 Stat. 1057.... 301, 307, 311, 555
1919, Feb. 24, c. 18, § 240, 40 Stat. 1057..... 547
1919, Oct. 28, c. 85, § 25, Title II, 41 Stat. 305..... 127, 209, 213
1920, Feb. 28, c. 91, 41 Stat. 453, 493..... 197
1920, Feb. 28, c. 91, § 209, 41 Stat. 453..... 146
1920, Feb. 28, c. 91, § 209f (3), (5), 209h, 41 Stat. 453..... 147
1920, Feb. 28, c. 91, § 418, 41 Stat. 453..... 230
1920, Feb. 28, c. 91, §§ 434–438, 41 Stat. 453..... 140
1920, Mar. 30, c. 111, § 1, 41 Stat. 537..... 372
1920, June 5, c. 250, § 33, 41 Stat. 988..... 279, 371
1921, Feb. 26, c. 72, § 212, 41 Stat. 1145..... 148
1921, May 19, c. 8, 42 Stat. 5..... 325
1921, Nov. 23, c. 136, 42 Stat. 227..... 105
1921, Nov. 23, c. 136, § 204 (a), (b), 42 Stat. 227..... 411, 412
1921, Nov. 23, c. 136, § 206, 42 Stat. 227..... 109
1921, Nov. 23, c. 136, § 214a (10), 42 Stat. 227.... 111, 554, 555, 556
1921, Nov. 23, c. 136, § 234 (a) (9), 42 Stat. 227.. 302
1921, Nov. 23, c. 136, § 240, 42 Stat. 227..... 547

Page.

1921, Nov. 23, c. 136, § 1331, 42 Stat. 227..... 546, 548
1922, May 11, c. 187, 42 Stat. 540..... 325
1922, June 7, c. 210, 42 Stat. 624..... 204
1924, May 26, c. 190, § 4 (e), 43 Stat. 153..... 340
1924, May 26, c. 190, § 6, 43 Stat. 153..... 325
1924, May 26, c. 190, § 14, 43 Stat. 153..... 130
1924, May 26, c. 190, § 16, 43 Stat. 153..... 340
1924, May 26, c. 190, § 20 (d), 43 Stat. 153..... 131
1924, May 26, c. 190, § 26, 43 Stat. 153..... 331, 337
1924, June 2, c. 234, 43 Stat. 253..... 109
1924, June 2, c. 234, § 206 (a), (b), 43 Stat. 253..... 407, 408
1924, June 2, c. 234, § 208 (a) (1), (a) (8), 43 Stat. 253..... 105
1924, June 2, c. 234, § 214a (9), 43 Stat. 253..... 111
1924, June 2, c. 234, § 234 (a) (8), 43 Stat. 253.. 302
1924, June 2, c. 234, § 240, 43 Stat. 253..... 547
1924, June 2, c. 234, § 302, 43 Stat. 253..... 225
1924, June 2, c. 234, § 906 (e), 43 Stat. 253..... 43
1924, June 2, c. 234, § 907 (a), 43 Stat. 253..... 312
1924, June 2, c. 234, Title IX, 43 Stat. 253..... 40
1924, June 7, c. 320, § 307, 43 Stat. 607..... 472
1925, Feb. 13, c. 229, 43 Stat. 936..... 81, 63, 564, 565, 569, 572, 573, 575, 576.
1925, Feb. 16, c. 241, 43 Stat. 1566..... 172
1925, Mar. 4, c. 521, 43 Stat. 1259..... 220 *et seq.*
1926, Feb. 26, c. 27, §§ 202, 203, 44 Stat. 9..... 465

Page.
1926, Feb. 26, c. 27, § 234 (a) (8), 44 Stat. 9.... 302
1926, Feb. 26, c. 27, § 240, 44 Stat. 9..... 547
1926, Feb. 26, c. 27, § 274 (a), (b), 44 Stat. 9... 40
1926, Feb. 26, c. 27, Title X, § 906 (e), 44 Stat. 9.. 40
1926, Feb. 26, c. 27, § 1003 (b), 44 Stat. 9..... 308
1927, Mar. 4, c. 509, 44 Stat. 1924 536
1928, May 17, c. 612, 45 Stat. 600..... 536
1928, May 21, c. 659, 45 Stat. 645, 667..... 317
1928, May 29, c. 852, 45 Stat. 791 307
1928, May 29, c. 852, § 23 (1), 45 Stat. 791..... 302
1928, May 29, c. 852, §§ 141, 142, 45 Stat. 791..... 547
1928, May 29, c. 852, § 601, 45 Stat. 791..... 312
1928, May 29, c. 852, Title IV, 45 Stat. 791..... 41
1929, June 18, c. 28, 46 Stat. 21..... 4
1930, May 14, c. 274, § 9, 46 Stat. 325..... 223
1930, July 3, c. 849, 46 Stat. 991..... 472
1932, June 6, c. 209, 47 Stat. 169..... 307
1932, June 6, c. 209, § 23 (1), 47 Stat. 169..... 302
Constitution. See Index at end of volume.
Criminal Code.
§ 37..... 120
§ 332..... 121
Judicial Code. (See also U.S. Code, Title 28.)
§ 24 (7)..... 434
§ 48..... 433, 435
§ 129..... 431, 432
§ 237..... 86
§ 237 (a)..... 564, 565, 569, 572, 573, 576
§ 237 (c)..... 563, 564, 565, 569, 572, 574, 577
§ 238..... 81, 575

Page.
Judicial Code—Continued.
§ 262..... 245
§ 266..... 263, 494
§ 267..... 94
Revised Statutes.
§ 716..... 245
§ 905..... 166
§ 997..... 91
§ 1011..... 481
§ 1014..... 250
§ 4282..... 424
§ 4283..... 429
U. S. Code.
Title 8, § 132..... 133
§ 145..... 331
§ 167a..... 133
§§ 202, 203..... 133
§ 204..... 133, 340
§ 205..... 133
§ 208..... 133
§ 216..... 341
Title 11, § 1..... 516
§ 21a..... 516
§ 52..... 120
§ 96b..... 93
Title 18, § 88..... 120
§ 397..... 115
§§ 398, 399..... 118
§ 550..... 121
§ 591..... 250
§§ 613–616..... 127
§ 682..... 81, 246
§§ 724–727..... 220
§ 753h..... 223
Title 21, § 2..... 80
Title 26, § 937..... 408
§ 1094..... 225
Title 27, § 12..... 126
§ 39..... 126, 127, 209, 213
Title 28, § 47..... 19
§ 109..... 434
§ 227..... 432
§ 344..... 86
§ 345..... 19, 81, 246, 575
§ 377..... 245
§ 380..... 5, 263, 386, 494, 573
§ 384..... 94
§ 837..... 281

U. S. Code—Continued.	Page.
Title 28, § 862	91
§ 878	564
§ 879	481
Title 45, §§ 1 to 6	373
§ 51	373, 376
Title 46, § 688	279, 371
§ 761	372
Title 49, § 5 (2), (8)	20
§ 15a	139
Title 49, § 15a 1	197
§ 15a 4	199
§ 19a.	139, 184, 188
§ 20	137
§ 20a	21, 27
§ 20a (2)	142
§ 77	146
§ 79	148

(B) Statutes of the States and Territories

	Page.
California.	
Code of Civil Procedure, § 752	228
Code of Civil Procedure, § 942	161
Connecticut.	
Constitution, Art. I, § 9.	62
1923 Pub. Acts, c. 190, § 1	511
1929 Pub. Acts, c. 299, §§ 1, 2	512
District of Columbia.	
Code, § 657	98
§§ 1301, 1302, 1303.	537
Delaware.	
Declaration of Rights, Sept. 11, 1776, Art. 14.	61
Constitution, 1776, Art. 25	61
1798 Rev. Pub. Laws, § 6	64
Florida.	
1927 Comp. Gen. Laws, § 7051	86
Georgia.	
Constitution, 1798, Art. III, § 8	63
Idaho.	
Comp. Stats., § 6726	167
Comp. Stats., §§ 7154, 7155	159
Indiana.	
1926, Burns Ann. Ind. Stats., vol. 3, §§ 12672 *et seq.*, 12728	494
Kentucky.	
1930 Acts, c. 149, § 10	11
Maryland.	
Constitution, 1776, Art. XIX	61
Massachusetts.	
Constitution, 1780, Part First, Art. XII	61
1921 Acts, c. 500	515
1921 Gen. Laws, c. 148, § 57 C, D	515
Michigan.	
1921, Act No. 85	296
1929, Act No. 175	296
Montana.	
Constitution, Art IV, § 1	346
Revised Code, §§ 3796, 3809, 3810	359
New Hampshire.	
Constitution, 1784, Part I, Art XV	61
New Jersey.	
Constitution, 1776, Art XVI	62
New York.	
Constitution, 1777, Art. XXXIV	61
Consolidated Laws, c. 12, Art. 10	355
North Carolina.	
1777, Sess. Laws, c. 115, § 85 (N. Car. Rev. Laws, 1715–1796, vol. 1, p. 316)	62
North Dakota.	
1919 Laws, c. 238	286
Pennsylvania.	
Penn Charter (Art. V), 1701	61
Constitution, 1776, Art. IX	61
Dallas, Laws of Penna. 1700–1781, vol. 1, p. 134	61

Page.
Pennsylvania—Continued.
Purdon's Digest, Title 39, §§ 351, 359, 360..... 355
Purdon's Digest, Title 39, §§ 357, 361..... 354
Rhode Island.
1798, Rev. Pub. Laws, § 6..... 64
South Carolina.
1731, Act of Aug. 20, § XLIII (Grimke, S. C. Pub. Laws, 1682–1790, p. 130)..... 62
1922 Code, vol. 3, §§ 4903, 4925..... 504
Texas.
Bill of Rights, Art. I, §§ 12, 24, 28, 29..... 395
Constitution, Art. IV, §§ I, 7, 10..... 394
1867 Bankruptcy Act... 528
1879 Acts, p. 57..... 528
1883 Acts, p. 46..... 528

Page.
Texas—Continued.
1925 Rev. Civ. Stats., Arts. 261–274, Title 12..... 528
1925 Rev. Civ. Stats., §§ 5778, 5830, 5834, 5889..... 394
1931 Gen. Laws (42d Legislature, Reg. Sess.), c. 277... 259 *et seq.*
Vernon's Ann. Civ. Stats., c. 26, Arts. 6008, 6014, 6029, 6032, 6036 6049c.... 389 *et seq.*
Virginia.
1734, Aug., c. VII, § III (Laws of Va., 8th Geo. II, Hening's Stat. at Large, vol. 4, p. 404). 62
Wisconsin.
1929 Stat., c. 128, § 128.06..... 521

(C) Foreign Statutes

Page.
English Statutes.
Fire Statute, 1786, 26 Geo. III, c. 86..... 425
Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, § 35..... 483
Judicature Act, 1875, 38 & 39 Vict. c. 77, Order 58 (1)..... 483

Page.
English Statutes—Continued.
Merchants Shipping Act, 1893, 57 & 58 Vict., c. 60, § 502..... 425
Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V, c. 49, § 99 (f) as amended by Geo. V, c. 26, § 8..... 483

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1932.

WOOD, SECRETARY OF STATE OF MISSISSIPPI, ET AL. *v.* BROOM.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 424. Argued October 13, 1932.—Decided October 18, 1932.

1. The provisions of the Reapportionment Act of August 8, 1911, requiring that congressional election districts be of contiguous and compact territory and, as nearly as practicable, of equal populations, related only to the districts to be formed under that Act, and were not reënacted in the Reapportionment Act of June 18, 1929. P. 8.
2. Where a bill sought to compel state election officials to conform to an Act of Congress which the court found to be no longer in force, *held* that questions whether, if the Act were effective, the controversy would be justiciable and the plaintiff entitled to equitable relief, need not be considered. *Id.*

1 F. Supp. 134, reversed.

APPEAL from a decree of the District Court of three judges, which, on final hearing on bill and answer, permanently enjoined officers of the State of Mississippi from conducting an election of representatives in Congress, in pursuance of an Act of the legislature, which the decree declared to be invalid and unconstitutional.

Messrs. J. A. Lauderdale and *Wm. H. Watkins,* Assistant Attorneys General of Mississippi, with whom *Mr. Greek L. Rice,* Attorney General, was on the brief, for appellants.

There is no equity on the face of the bill, because plaintiff had a plain, speedy, complete and adequate remedy at law, and because there is no probability of a multiplicity of suits.

There is no equity jurisdiction. The amount in controversy does not exceed $3,000.00. A federal court of equity has no jurisdiction to prevent the deprivation of a political right. *Ex parte Sawyer,* 124 U. S. 200; *Cleveland Cliff Iron Co.* v. *Kinney,* 262 Fed. 980; *Angelus* v. *Sullivan,* 246 Fed. 54, citing many other cases; *Taylor* v. *Kercheval,* 82 Fed. 497; *Anthony* v. *Burrow,* 129 Fed. 783; *Ohio* v. *Hildebrandt,* 231 U. S. 565; 9 R. C. L. 987, § 10; 10 R. C. L. 342, § 92; 14 R. C. L. 375, § 77.

Sub-section 15 of § 24, Judicial Code, gives the federal courts jurisdiction to try the title to certain offices. However, members of Congress are especially excepted therefrom and the denial of the right to vote must be on account of race, color or previous condition of servitude. This section gives the court jurisdiction where certain political rights are involved. To give jurisdiction therein is to exclude jurisdiction in any other matters.

Under the facts stated in the bill, plaintiff is not entitled to have his name placed on the ballot as a candidate for Congress from the State at large.

The decree of this Court would be inefficacious.

Sec. 4, Art. 1, of the Constitution and the Act of Congress of 1911 are directory and not mandatory.

Congress, being the sole judge thereof, has construed the statute as not being mandatory but directory, and as an administrative matter, exclusively for the States.

1 Argument for Appellee.

An elector of a congressional district is not entitled under the Fourteenth Amendment to the Constitution to equality in representation with other districts throughout the State.

Since the appellee has brought his suit before a three-judge district court of the United States, the jurisdiction must rest upon the unconstitutionality of a state statute and not the alleged violation by the state statute of a federal statute.

There is complete compliance with the Fourteenth Amendment where there exists no inequality as to residents of the separate districts.

Messrs. Hugh V. Wall and *Cleon K. Calvert,* with whom *Messrs. J. H. Price, J. O. S. Sanders,* and *S. B. Laub* were on the briefs, for appellee.

One who is deprived of the right of equal suffrage in the choice of federal officers, when that right has been granted by a State, is deprived of a vested right under the Constitution of the United States and of one which equity, as administered in the federal courts, will protect. Cooley, Const. L., p. 248; *Gougar* v. *Timberlake,* 148 Ind. 41; *Ex parte Yarbrough,* 110 U. S. 651; *Wiley* v. *Sinkler,* 179 U. S. 58.

A qualified voter in a State, who is denied the right of equal representation by a state congressional redistricting act, may complain against the Act in equity in a federal court in his own name and person. *Smiley* v. *Holm,* 285 U. S. 355.

The Act of Congress of August 8, 1911 is a valid exercise of congressional power and is still in force.

The right to make reasonable qualifications for party membership is a political matter with which equity has naught to do. But the right to vote is a legal right that equity will protect.

Messrs. John R. Saunders, Attorney General, *Edwin H. Gibson* and *Collins Denny, Jr.,* Assistant Attorneys General, and *Albert V. Bryan,* by leave of Court, filed a brief on behalf of the Commonwealth of Virginia, as *amicus curiae.* In this it was argued that the provisions of the Act of 1911 as to the compactness, etc., of congressional election districts, and their equality in population, were no longer in force. The brief pointed out that those provisions, and like provisions in earlier Acts, had been persistently violated by the States, and contended that the subject was really one for the States to deal with free from any control by the federal courts.

Mr. Chief Justice Hughes delivered the opinion of the Court.

Under the reapportionment pursuant to the Act of June 18, 1929 (c. 28, 46 Stat. 21, 26, 27), Mississippi is entitled to seven representatives in Congress, instead of eight as theretofore. The Legislature of Mississippi, by an act known as House Bill No. 197, Regular Session 1932, divided the State into seven congressional districts. The complainant, alleging that he was a citizen of Mississippi, a qualified elector under its laws, and also qualified to be a candidate for election as representative in Congress, brought this suit to have the redistricting act of 1932 declared invalid and to restrain the defendants, state officers, from taking proceedings for an election under its provisions. The alleged grounds of invalidity were that the act violated Art. I, § 4, and the Fourteenth Amendment, of the Constitution of the United States, and § 3 of the Act of Congress of August 8, 1911 (c. 5, 37 Stat. 13). Defendants moved to dismiss the bill (1) for want of equity, (2) for lack of equitable jurisdiction to grant the relief asked, (3) because on the facts alleged the complainant was not entitled to have his name placed upon

the election ballot as a candidate from the State at large, and (4) because the decree of the court would be ineffacious. The District Court, of three judges, granted an interlocutory injunction, and after answer, which admitted the material facts alleged in the bill and set up the same grounds of defense as the motion to dismiss together with a denial of the unconstitutionality of the challenged act, the court on final hearing, on bill and answer, entered a final decree making the injunction permanent as prayed. Defendants appeal to this Court. U. S. C., Tit. 28, § 380.

The District Court held that the new districts, created by the redistricting act, were not composed of compact and contiguous territory, having as nearly as practicable the same number of inhabitants, and hence failed to comply with the mandatory requirements of § 3 of the Act of August 8, 1911. Sections 3 and 4 of that Act are as follows:

"Sec. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

"Sec. 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now

prescribed by law until such State shall be redistricted as herein prescribed."

The Act of August 8, 1911, as its title states, was an act "For the apportionment of Representatives in Congress among the several States under the Thirteenth Census," that is, the census of 1910. The first section of the act fixed the number of the House of Representatives and apportioned that number among the several States. Its second section related to the allotment of representatives to the territories of Arizona and New Mexico. The third and fourth sections expressly applied to the election of representatives to which the State was entitled "under this apportionment," that is, under the apportionment under the Act of 1911 pursuant to the census of 1910. Substantially the same provisions are found in prior reapportionments acts, the requirements as to compactness, contiguity, and equality in population in the new districts in which representatives were to be elected under the new apportionment being addressed in each case to the election of representatives "under this apportionment," that is, the apportionment made by the particular act. Act of June 25, 1842, c. 47, § 2, 5 Stat. 491; Act of February 2, 1872, c. 11, § 2, 17 Stat. 28; Act of February 25, 1882, c. 20, § 3, 22 Stat. 5, 6; Act of February 7, 1891, c. 116, §§ 3, 4, 26 Stat. 735, 736; Act of January 16, 1901, c. 93, §§ 3, 4, 31 Stat. 733, 734.

The Act of June 18, 1929, however, in providing for the reapportionment under the Fifteenth Census (none having been made under the Fourteenth Census) omitted the requirements as to the compactness, contiguity, and equality in population, of new districts to be created under that apportionment. It did not carry forward those requirements as previous apportionment acts had done. There was, it is true, no express repeal of §§ 3 and 4 of the Act of 1911 and, as the Act of 1929 did not deal with the subject, it contained no provision inconsistent with

the requirements of the Act of 1911. *Smiley* v. *Holm*, 285 U. S. 355, 373. No repeal was necessary. The requirements of §§ 3 and 4 of the Act of 1911 expired by their own limitation. They fell with the apportionment to which they expressly related. The inquiry is simply whether the Act of 1929 carried forward the requirements which otherwise lapsed. The Act of 1929 contains no provision to that effect. It was manifestly the intention of the Congress not to re-enact the provision as to compactness, contiguity, and equality in population with respect to the districts to be created pursuant to the reapportionment under the Act of 1929.

This appears from the terms of the act, and its legislative history shows that the omission was deliberate. The question was up, and considered. The bill which finally became the Act of 1929 was introduced in the first session of the 70th Congress and contained provisions similar to those of §§ 3 and 4 of the Act of 1911. H. R. 11,725; Cong. Rec., 70th Cong., 1st sess., vol. 69, p. 4054. At the second session of the 70th Congress, the House of Representatives, after debate, struck out these provisions. Cong. Rec., 70th Cong., 2d sess., vol. 70, pp. 1496, 1499, 1584, 1602, 1604. The bill passed in the House of Representatives in that form (*id* p. 1605) and, although reported favorably to the Senate without amendment (*id.* 1711), did not pass at that session. The measure as to reapportionment was reintroduced in the Senate in the first session of the 71st Congress in the form in which it had passed the House of Representatives, and had been favorably reported to the Senate in the preceding Congress, that is, without the requirements as to compactness, contiguity, and equality in population, which had been deleted in that Congress. S. 312, 71st Cong., 1st sess., Cong. Rec., vol. 71, pp. 254, 2450. And when, after the passage of this bill in the Senate, it was before the House of Representatives, and an effort was made to amend

the bill so as to make applicable the requirements of § 3 of the Act of 1911 with respect to the districts to be created under the new apportionment, the amendment failed. The point of order was sustained that, as the pending bill did not relate to redistricting of the States by their legislatures, the amendment was not germane. Cong. Rec., 71st Cong., 1st sess., vol. 71, pp. 2279, 2280, 2363, 2364, 2444, 2445. The bill was then passed without the requirements in question. Cong. Rec., 71st Cong., 1st sess., vol. 71, p. 2458.

There is thus no ground for the conclusion that the Act of 1929 re-enacted or made applicable to new districts the requirements of the Act of 1911. That act in this respect was left as it had stood, and the requirements it had contained as to the compactness, contiguity and equality in population of districts, did not outlast the apportionment to which they related.

In this view, it is unnecessary to consider the questions raised as to the right of the complainant to relief in equity upon the allegations of the bill of complaint, or as to the justiciability of the controversy, if it were assumed that the requirements invoked by the complainant are still in effect. See *Ex parte Bakelite Corporation,* 279 U. S. 438, 448. Upon these questions the Court expresses no opinion.

The decree is reversed and the cause is remanded to the District Court with directions to dismiss the bill of complaint.

Reversed.

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE, MR. JUSTICE ROBERTS, and MR. JUSTICE CARDOZO are of opinion that the decree should be reversed and the bill dismissed for want of equity, without passing upon the question whether § 3 of the Act of August 8, 1911, is applicable. That question was not presented by the

pleadings or discussed in either of the opinions delivered in the District Court. 1 F. Supp. 134. It was not mentioned in the Jurisdictional Statement filed under Rule 12 or in the briefs of the parties filed here. So far as appears, all the members of the lower court and both parties have assumed that § 3 is controlling.

STEWART DRY GOODS CO. *v.* LEWIS ET AL.[1]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 27. Argued October 21, 1932.—Decided October 24, 1932.

A bill in equity to restrain the collection of state taxes under a statute alleged to violate the Federal Constitution should not be dismissed on bill and answer upon the ground that the statute affords an adequate legal remedy by payment under protest and action to recover, when the allegations of the bill put in doubt whether, if that remedy were pursued and the claim allowed, satisfaction of it could be secured certainly and within a reasonable time out of the fund designated by statute as the source of such payments. P. 10.

Reversed.

These were four suits by retail merchants seeking to enjoin collection of taxes on gross sales, measured by progressively increasing rates. All the bills invoked the due process and equal protection clauses of the Fourteenth Amendment, and in two of them it was claimed, also, that the tax operated as a direct burden on interstate commerce. By stipulation the cases were heard together and disposed of by one opinion of the three-judge District Court. The cases were treated as submitted upon bill and answer as well as upon plaintiffs' motion for prelim-

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[1] Together with No. 28, *Levy et al.* v. *Lewis et al.*, and No. 29, *J. C. Penney Co.* v. *Same*, both from the Western District of Kentucky, and No. 30, *Kroger Grocery & Baking Co.* v. *Same*, from the Eastern District.

inary injunctions and defendants' motions to dismiss; and all suits were dismissed. The tenth section of the Kentucky statute, referred to in the court's opinion, is copied below.[2]

Mr. Robert S. Marx, with whom *Messrs. John C. Doolan, Frank E. Wood, Harry Kasfir,* and *James W. Stites* were on the brief, for appellants.

Mr. S. H. Brown, Assistant Attorney General of Kentucky, with whom *Messrs. Bailey P. Wootton,* Attorney General, *Francis M. Burke,* Assistant Attorney General, and *Leslie W. Morris* were on the brief for appellees.

PER CURIAM.

After interlocutory injunction had been granted, these cases went respectively to final hearing upon motions to dismiss the bills of complaint, and these were dismissed solely upon the ground that plaintiffs had an adequate remedy at law. The Court is of the opinion that the decision cannot be sustained merely upon the face of the

[2] "§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

statute invoked (Kentucky Acts of 1930, c. 149, § 10) in view of the allegations of the bills of complaint that the only remedy provided is to obtain warrants upon the General Fund of the State in the hands of the State Treasurer to be paid if and when funds are available for the payment of such warrants in the usual and orderly course; that there are now outstanding many such warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer, which have been outstanding since June, 1927, and cannot be collected by the owners or holders for lack of funds in the Treasury; and that there were at the time of the beginning of these suits outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer, presented for payment, but not paid for lack of funds. (See *State Budget Commn.* v. *Lebus,* 244 Ky. 700, 703, 714; 51 S. W. (2d) 965, as to warrants outstanding.) Defendants' answers denied the above-mentioned allegations, but it does not appear that there has been a hearing upon evidence of the issue tendered and no findings of fact upon the subject have been made by the courts below.

The decrees are reversed and the causes remanded to the District Courts, of three judges, for final hearing upon the merits, without prejudice to a determination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury, and whether warrants of the sort contemplated by § 10 of the Act in question are accorded preference in payment over other warrants, and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under § 10 they would be afforded a certain, reasonably prompt and efficacious remedy. *Davis* v. *Wakelee,* 156 U. S. 680, 688; *Atlantic Coast Line R. Co.* v. *Daughton,* 262 U. S. 413, 426.

NEW YORK CENTRAL SECURITIES CORPORATION *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 5. Argued October 14, 17, 1932.—Decided November 7, 1932.

1. Subdivision (2) of § 5 of the Transportation Act empowers the Interstate Commerce Commission, when of the opinion that acquisition by one carrier of control of another, "either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation," will be in the public interest, to authorize such acquisition, on such terms and conditions as the Commission finds to be just and reasonable, etc. Subdivision (6) of the same section permits carriers, with the approval of the Commission, "to consolidate their properties or any part thereof into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation," upon the condition (among others) that the consolidation must be in harmony with the complete plan, to be adopted by the Commission under subdivisions (4) and (5), for consolidation of the railway properties of the United States into a limited number of systems. *Held:*

(1) Under subdivision (2) the Commission may authorize a carrier that already controls others by stock ownership, to have control also by lease, for the purpose of securing greater economy and efficiency of operation. The disjunctive phrasing, "either under a lease or by purchase of stock," does not mean that one method must be exclusive of the other. Pp. 22–23.

(2) The extent of control allowable by the Commission under subdivision (2), short of "consolidation," is tested by its relation to the public interest. That interest is served by economy and efficiency in operation. P. 23.

(3) A consolidation within the meaning of subdivision (2) is one for ownership as well as operation. The acquisition proposed in this case was not such a consolidation. *Id.*

(4) Whether the authority to lease in this case would interfere with the plans of the Commission for consolidation of carriers was an administrative question for the Commission to decide. P. 24.

(5) "Public Interest," the criterion of the Commission's authority under subdivision (2), is not the public welfare in general, but the public interest in the adequate transportation service sought to be secured by the Act. Objection that the delegation of authority is invalid for lack of definition, is not tenable. P. 24.

(6) Congress had power to foster interstate commerce by removing the restrictions of the antitrust laws as respects the control by one carrier of the parallel and competing line of another, and to permit such control in aid of the purposes of the Transportation Act, as provided by subdivisions (2) and (8) of § 5 thereof. P. 25.

(7) An order of the Commission permitting a lease under subdivision (2) is permissive, not mandatory; and the question whether the lease so authorized is beyond the powers of the carriers because of the laws of the States of incorporation relating to leasing of competing lines, minimum rentals, and security for payment and preservation of property, is not a question which the Commission is required to decide or which can be raised in a suit to set aside its order. P. 26.

(8) The authority of the Commission to impose conditions was not restricted to conditions favored by the carriers, and was not overstepped in this case by a condition that the lessee acquire certain short lines that were complementary to its railway system. P. 28.

2. By § 20 (a) of the Transportation Act, a carrier is forbidden to assume any liability, as lessor, lessee or otherwise, in respect of the securities of another, unless, and only to the extent that, the Commission authorizes; and the Commission may make such order only (among other conditions) when it finds that such assumption "is for some lawful object within its corporate purposes, and compatible with the public interest, which is . . . consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service." Subdivision (7) declares that the jurisdiction conferred upon the Commission by the section shall be exclusive and plenary, and that a carrier may assume obligations in accordance with the provisions of the section without securing approval otherwise than as specified therein. *Held:*

(1) That the requirement that the assumption be "for some lawful object within its corporate purposes" refers, not to state limitations upon corporate powers, but to the general field of corporate purposes. P. 27.

(2) That the Commission need not determine whether there has been compliance with state requirements and the question whether the assumption permitted by its order is contrary to state law could not be raised in a suit to set its order aside. *Id.*

3. In a suit under U. S. C., Title 28, § 47 ("Urgent Deficiencies Act"), to set aside an order of the Interstate Commerce Commission permitting a carrier to acquire control by lease of the railway of another company, questions as to whether the lessee, as majority stockholder of the lessor company, failed in its fiduciary duty to the plaintiff, as a minority stockholder,—*held* not properly raised in the trial court or open to review on appeal. P. 28.
4. An order of the Commission permitting a lease under § 5 (2) will not be set aside upon objections going to the adequacy of the rentals and the propriety of the lease, where the parties were fully heard by the Commission and where there is no basis for contending that the order was not adequately supported by evidence or that it had any confiscatory effect. P. 29.

54 F. (2d) 122, affirmed.

APPEAL from a decree of the District Court of three judges dismissing a bill to set aside orders of the Interstate Commerce Commission. One of the orders authorized the New York Central Railroad Company to acquire control by lease of the railroad systems of the "Big Four" and Michigan Central companies; another permitted the lessee to assume obligation and liability in respect of certain securities of the lessors. The plaintiff corporation was a minority stockholder in each of the three railroad companies.

Mr. Frederick A. Henry, with whom *Messrs. Louis J. Vorhaus* and *Joseph Fischer* were on the brief, for appellant.

The New York Central having already acquired control by stock ownership, there was no power to authorize the acquisition of control by lease.

The intent of the limitation "not involving the consolidation of such carriers into a single system for owner-

ship and operation," was to deter the Commission from taking any action—under color of § 5 (2), and in advance of the promulgating under § 5 (5) of its nation-wide plan adopted and published since the orders herein complained of were made—which might forestall its exertion of the power conferred by § 5 (6) to permit carriers "to consolidate their properties or any part thereof into one corporation for the ownership, management and operation of the properties theretofore in separate ownership, management and operation." Congress in this manner restricted the extent of advance control allowable by the Commission so that the latter should keep both able and free to "unscramble" the elements involved in any acquisition of control and to reallocate the same in accordance with the complete plan. Cf. Control of Big Four by New York Central, 72 I. C. C. 96, 98; also Control of Central Pacific by Southern Pacific, 76 I. C. C. 508, 525, reserving the right to terminate lease and stock control.

The term "consolidation" does not necessarily import the acquiring of general title to constituent properties, but embraces as well what the Commission styles a "unification." *East St. L. Ry. Co.* v. *Jarvis,* 92 Fed. 735; *Borg* v. *Illinois Terminal Co.,* 16 F. (2d) 988; *People* v. *People's Gas Light Co.,* 205 Ill. 482, 492; 1 Beach on Private Corp'ns, § 334. While "ownership" is not at common law a technical term but is as broadly inclusive as property and property rights (*Baltimore & Ohio R. Co.* v. *Walker,* 45 Oh. St. 114; *Federal Trade Commn.* v. *Thatcher Mfg. Co.,* 5 F. (2d) 615, 620, 621), the word especially fits the purposes of § 5 (2) and 5 (6), since degree of dominion rather than mere kind of title is the basis alike of what the one paragraph undertakes to forbid and the other to permit—inseparable unions of carriers. Under the latter paragraph no technical

consolidation of the properties of two or more carriers pursuant to the permanent plan would ever be feasible if a strictly allodial or fee simple title is the only sort of ownership in the "one corporation" that can satisfy the statute.

Departmental practice should not be held to validate a usurpation that outstrips any clear precedent the Commission had theretofore established. The Commission, moreover, has vacillated in its allowance or denial or proposed expansions and combinations of railroad properties under §§ 1 (18) and 5 (2), (see Consolidation of D. T. & I. and D. I. R. R., 124 I. C. C. 145, 159; and cf. Acquisition and Stock Issue by N. Y. C. & St. L. R. Co., 79 I. C. C. 581), and has itself intimated that its own decisions under divers provisions of the Transportation Act are not to be deemed binding upon it. Securities of La. Ry. & Nav. Co., 99 I. C. C. 357.

Jurisdiction of the Commission to make an approving order under § 5 (2) hinges upon its finding first that the proposed acquisition of control will be "in the public interest." *Wichita R. R. & Light Co.* v. *Public Utilities Commn.*, 260 U. S. 48, 58; *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U. S. 74, 86. The Act itself, however, prescribes no definite standard, nor any intelligible principle, to which the Commission is directed to conform; and the report cites none. Cf. Clinchfield Ry. Lease, 90 I. C. C. 113, 121. To leave this essentially legislative concept to the determination and discretion of the Commission is an unconstitutional delegation by Congress of its legislative power. *Hampton & Co.* v. *United States*, 276 U. S. 394, 409.

Those things must certainly be deemed to be against "public interest" which Congress by § 5 (4) has prohibited in railroad consolidations, *viz.*, every unnecessary suppression of competition and every avoidable diversion of

existing traffic routes. But they are precisely the ends which in the same asserted interest this acquisition of control purports to achieve.

The above-cited provision of § 5 (4) stands in apparent opposition to that of paragraph (8), which relieves the carriers affected by orders under earlier provisions of the section "from the operation of the 'antitrust laws.'" In the face of this dilemma, which looks to both the preserving and the relinquishing of competition, the only escape from repugnancy fatal to the whole section (*Rice* v. *Minnesota & N. W. R. Co.*, 1 Black 358, 378–379) lies in so restricting the scope of the latter paragraph that if any valid order of the Commission under a preceding provision of § 5 interrupts competition in minor particulars that cannot be obviated—which is the most that any such order can lawfully do in view of the limitation in paragraph (4)—then paragraph (8) will operate to relieve the carriers concerned from the resulting incidental or technical breaches of the antitrust laws.

Accruing thus automatically, such immunity may be conceived to proceed directly from the will of Congress. But without such restriction of the scope of paragraph (8), it must proceed from the Commission's discretion—under an inadmissible, as well as a repugnant, delegation by Congress of its legislative power.

As exertions of corporate power by the carriers concerned, the proposed leases are not within the sanction of the controlling statute of Ohio; and as combinations of competing lines, they contravene constitutional or statutory limitations of corporate power to enter into such leases, in every State they touch; so that on either ground the Commission was without power to approve and authorize them. The carriers still derive from the States their corporate power, and the mode prescribed for exercising it, to enter into leases; and in Ohio the

limitations of such power are inseparable from the grant. Section 5 (2) prescribes no internal corporate proceedings for the making of such demise, but leaves the carriers in this respect where it finds them, namely, subject to the corporation codes of the States where they are chartered to do business.

The orders herein complained of contravene the Ohio statute—and under the first of the following specifications the cited laws of other States as well—in approving and authorizing the New York Central's acquisition of control, *ultra vires,* (a) by leases of competing lines, (b) for a rental less in each case than the net earnings of the leased road for the fiscal year next preceding, and (c) without security for payment of the rental and preservation of the property.

The attack based upon the state law limitations of the corporate power has place in the suit to annul the order. *Cleveland, C., C. & St. L. Ry. Co.* v. *Jackson,* 22 F. (2d) 509, 511; *Pittsburgh & W. Va. Ry. Co.* v. *United States,* 281 U. S. 479; *Chicago Junction Case,* 264 U. S. 258; *Interstate Commerce Commn.* v. *Union Pac. R. Co.,* 222 U. S. 541; *Sprunt & Son* v. *United States,* 281 U. S. 249; *Venner* v. *Michigan Central R. Co.,* 271 U. S. 127. Cf. *Southern Pacific Co.* v. *Willow Glen,* 49 F. (2d) 1005, 1008.

The conclusion is inevitable that in a minority stockholders' suit begun in the District Court under the Urgent Deficiencies Act to set aside an order of the Commission under § 5 (2) upon the ground that such order denies him equal treatment or will unlawfully injure his pecuniary interest as an investor, the plaintiff may litigate every question pertinent to such claim as in a plenary suit in equity; for otherwise he would no longer have a remedy to prevent threatened damage to himself from unconscionable or *ultra vires* acts by his own corporation in the carrying out of permissive orders of the Commission; or

else such orders would be subject to defeat in suits for injunction to which the Commission is not made a party.

The Commission was without power to condition its authorization upon the acquisition of the burdensome short lines.

Mr. Daniel W. Knowlton, with whom *Solicitor General Thacher* and *Assistant to the Attorney General O'Brian* were on the brief, for the United States and Interstate Commerce Commission, appellees.

Mr. Jacob Aronson, with whom *Mr. Charles C. Paulding* was on the brief, for the New York Central Railroad Company et al., appellees.

Mr. Chief Justice Hughes delivered the opinion of the Court.

On July 2, 1929, the Interstate Commerce Commission made an order authorizing the New York Central Railroad Company to acquire control, by lease, of the railroad systems of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (known as the 'Big Four') and of the Michigan Central Railroad Company. By order of December 2, 1929, the Commission permitted the assumption by the lessee of obligation and liability in respect of certain securities of the lessors. In this suit, a minority stockholder of each of the lessors, and of the lessee, sought to set aside these orders upon the ground that the Commission had exceeded its authority. The District Court, of three judges, upon pleadings and proofs, and having filed findings of fact and conclusions of law, denied the motion for injunction and dismissed the petition upon the merits. 54 F. (2d) 122. The petitioner appeals. U. S. C., Tit. 28, §§ 47, 345.

The District Court, against objection, sustained its jurisdiction. The court took the view that the petitioner,

as a minority stockholder of the lessors, alleged an injury not merely derivative, but independent, being a member of a class created by the leasing agreements. 54 F. (2d) at p. 126; compare *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, 487. While appellees submit that there are certain contentions which appellant may not properly raise, the correctness of the decision as to jurisdiction is conceded.

The authority of the Commission to make the orders is rested upon § 5, subdivision 2, and § 20a of the Interstate Commerce Act. U. S. C., Tit. 49.[1] After full hearing, and upon consideration of the purpose of the proposals, of the physical, traffic and intercorporate relationships, of investment, income and dividends, of the provisions of the proposed leases, of the benefits deemed to accrue to the public, of the particular situation of certain short lines, and of the objections raised by minority stockhold-

[1] The pertinent provisions of these sections are as follows:

"Sec. 5 (2): *Acquisition of control of one carrier by another.*— Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this chapter, that the acquisition, to the extent indicated by the commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the commission to be just and reasonable in the premises. . . ."

"Sec. 5 (8): *Carriers affected relieved from operation of antitrust laws, etc.*—The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order are relieved from the operation of the 'antitrust laws,' as designated in section 12 of Title 15, Commerce and Trade, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to

ers, the Commission found that the "considerations and terms and conditions" set forth in the proposed leases were "just and reasonable" and that the contemplated acquisition would be "in the public interest." The authorization was upon the express condition that before the leases became effective, the New York Central should offer to acquire specified short lines upon terms and conditions stated. Report, January 14, 1929, 150 I. C. C. 278, 321, 322. Upon proof of compliance with this condition, and upon further conditions, the acquisition was approved. Supplemental Report and Order of July 2, 1929, 154 I. C. C. 489, 494, 495. One of the conditions was that the New York Central and the 'Big Four' should not be relieved from compliance with provisions of law applicable to any assumption of obligations and liabilities by virtue of the execution of the leases. On later appli-

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enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section. . . ."

"Sec. 20a (2): *Issuance of securities; assumption of obligations; authorization.*—It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. . . ."

cation for authority in that respect, the Commission found that the proposed assumption by the carriers was "for a lawful object within their corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by them of service to the public as common carriers, and which will not impair their ability to perform that service" and was "reasonably necessary and appropriate for such purpose." Report and Order of December 2, 1929, 158 I. C. C. 317, 323, 328.

Appellant contends (a) that as the New York Central had already acquired control of the 'Big Four' and Michigan Central by stock ownership, the Commission could not authorize acquisition of control by lease; (b) that the proposed acquisition involved a "consolidation" which could not be authorized under § 5 (2); (c) that the main lines of the lessors are parallel and competing with those of the lessee so that competition would be suppressed, and that the attempt to confer authority upon the Commission to approve the acquisition of control was an unconstitutional delegation of power; (d) that the proposed leases transgressed limitations imposed by state authority; and (e) that the action of the Commission was unsupported by evidence and was arbitrary and confiscatory as to the appellant. The questions presented thus relate, in part, to the construction and validity of the statute and, in part, to the present application of the statute in view of the particular terms of the leases.

First. The Commission stated that, while the properties of the New York Central, the 'Big Four' and the Michigan Central are operated as separate units, the companies are under common control. This control has existed for many years. The Commission found that the New York Central held upwards of 99 per cent. of the stock of the Michigan Central and upwards of 91 per cent. and 84 per cent., respectively, of the common and

preferred stocks of the 'Big Four.' The authority to lease was sought in the view that it would facilitate revision of routes, and physical improvements needed for new routes, and would make possible important economies in operation which the Commission set forth in detail. Section 5 (2) authorizes the acquisition of control "to the extent indicated by the Commission." The question is not of the extent of the control, provided it stops short of "consolidation," but of the public interest in having the control maintained. The public interest is served by economy and efficiency in operation. If the expected advantages are inadequately secured by stock ownership and would be better secured by lease, the statute affords no basis for the contention that the latter may not be authorized although the former exists. The fact that one precedes the other cannot be regarded as determinative if the desired coordination is not otherwise obtainable. The disjunctive phrasing of the statute "either under a lease or by the purchase of stock" must be read in the light of its obvious purpose and cannot be taken to mean that one method must be exclusive of the other.

The statute refers to "control" in contradistinction to "consolidation." Subdivision (2) itself indicates that control by purchase of stock or by lease is not regarded as a "consolidation" as the word is there used. Its use is in the restricted sense of the formation of a "single system for ownership" as well as for "operation." This distinction between control where separate ownership continues, and consolidation where a single ownership is created, is a familiar one in the law. *Railroad Co.* v. *Georgia,* 98 U. S. 359, 363. That the Congress had this distinction in view appears from the other provisions of § 5. Thus, subdivision (6) permits carriers "to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, man-

agement, and operation." This may be effected under stated conditions which contemplate the ownership by one corporation of the consolidated properties and the issue of securities upon that basis. The view that the proposed acquisition does not involve a "consolidation" contrary to the limitation in subdivision (2) is in accord with the long-continued construction of the statute by the Interstate Commerce Commission. Control of El Paso & S. W. System, 90 I. C. C. 732; Control of Alabama & Vicksburg, etc., 111 I. C. C. 161, 169; Lease of Pan Handle, 72 I. C. C. 128, 133; New York Central Leases, 72 I. C. C. 243; Control of Central Pacific, 76 I. C. C. 508; Nickle Plate Unification, 105 I. C. C. 425. And this administrative construction would be persuasive if the statute could be regarded as ambiguous. *United States* v. *Jackson,* 280 U. S. 183, 193; *Louisville & Nashville R. Co.* v. *United States,* 282 U. S. 740, 757. Whether the particular authorization, in the light of the situation of these carriers, would interfere with plans of the Commission for consolidation was an administrative question with which the Commission was competent to deal.

Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the "public interest." It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court, in *New England Divisions Case,* 261 U. S. 184, 189, 190, adverted to that purpose, which was found to be expressed in unequivocal language; "to attain it, new rights, new

obligations, new machinery, were created." The Court directed attention to various provisions having this effect, and to the criteria which the statute had established in referring to "the transportation needs of the public," "the necessity of enlarging transportation facilities," and the measures which would "best promote the service in the interest of the public and the commerce of the people." *Id.* p. 189, *note.* See, also, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 277. The provisions now before us were among the additions made by Transportation Act, 1920, and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity. *Intermountain Rate Cases*, 234 U. S. 476, 486; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 343, 344; *Avent* v. *United States*, 266 U. S. 127, 130; *Colorado* v. *United States*, 271 U. S. 153, 163; *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42.

The fact that the carriers' lines are parallel and competing cannot be deemed to affect the validity of the authority conferred upon the Commission. The Congress, which had power to impose prohibitions in the regulation of interstate commerce, *Northern Securities Co.* v. *United States*, 193 U. S. 197, had equal power to foster that commerce by removing prohibitions and by permitting acquisition of control where that was found to be an aid

in the accomplishment of the purposes in view in the enactment of Transportation Act, 1920. See *New York* v. *United States,* 257 U. S. 591, 601; *Colorado* v. *United States,* 271 U. S. 153, 165. Exercising this paramount power, the Congress expressly provided in subdivision (8) of § 5, which has direct reference to subdivision (2), that " the carriers affected by any order made under the foregoing provisions of this section " are " relieved from the operation of the ' antitrust laws,' " and " of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section." The question whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case.

Appellant contends that the provision of subdivision (8) of § 5, referring to " restraints or prohibitions by law, State or Federal " should be construed as limited to those restrictions which are of the same general character as the ' antitrust laws ' and not as applying to specific limitations imposed by state laws upon corporate powers with respect to the making of leases. Appellant invokes the laws of the States of incorporation in relation to leases of competing lines, and especially the laws of Ohio upon that subject and with respect to minimum rentals and security for payment and the preservation of property. It is sufficient for the present purpose to say that this contention cannot, in any event, avail the appellant. The question of the right of a State of incorporation, in a direct proceeding, to challenge the leases as *ultra vires* is not before us. See *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *United States,* 275 U. S. 404, 414. The order of the Commission under § 5 (2) is permissive, not man-

datory. There is no warrant for concluding that the Congress intended to fetter the exercise of the Commission's authority by requiring that the Commission before making its order must determine whether the acquisition is within the corporate powers of the carrier under state laws. The Commission has given its approval in the exercise of the authority conferred and the question of corporate powers cannot properly be raised in this suit to set aside the Commission's order. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., supra; Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382, 391.

Nor is there ground for a different conclusion with respect to the Commission's order under § 20a, authorizing the assumption of obligations. Appellant points to the requirement in that section that the Commission shall make such an order only if it finds that the assumption by the carrier is "for some lawful object within its corporate purposes." But that this provision does not refer to state limitations upon corporate powers, but rather to the general field of corporate purposes, sufficiently appears from the context and from the legislative history of the clause. In creating federal supervision of the issue of securities by interstate carriers, the Congress, so far from making it necessary for the Commission to determine whether there had been compliance with state requirements, expressly provided in subdivision (7) of § 20a that the jurisdiction of the Commission should be "exclusive and plenary" and that approval other than as specified in that section, should not be necessary.[2]

[2] It appears that in the course of the consideration of the measure which ultimately became § 20a (2) the words "corporate purposes" were substituted for "corporate powers." 54 F. (2d) at p. 130, *note.* It should also be noted that, in connection with the provision which became subdivision (7) of § 20a, an amendment was offered in the House of Representatives to strike out that paragraph and to provide that no security should be issued under the Act "except in the man-

Another objection, urged against the order under § 5 (2), is that the Commission had no power to make the acquisition of certain short lines a condition of its approval of the leases. The condition is asserted to be a burdensome one, opposed by the New York Central when it made its application and involving the building up of an enlarged system. But § 5 (2) expressly authorized the Commission to impose conditions, and its action in so doing was not limited to conditions proposed or favored by the carriers. The Commission stated the facts as to each of the short lines (150 I. C. C., pp. 294–311) and the Commission found that those lines to which the condition relates were complementary to the New York Central System and that their preservation was "required by public convenience and necessity and for the maintenance of an adequate transportation system." *Id.*, p. 322. It cannot be said that the consideration of the situation of these short lines was not appropriate to the determination which the Commission was called upon to make or that the condition was arbitrarily imposed.

Second. Questions as to the alleged breach by the New York Central, as majority stockholder of the Michigan Central, of its fiduciary duty to the appellant as minority stockholder, in the light of the terms of the indenture under which the voted shares had been pledged to secure bonds, are not properly raised in this suit under the Urgent

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ner and form prescribed by the laws of the state which created such common carrier, and that this section is not to be construed as a limitation of state authority, but only as cumulative thereof." The amendment was defeated. Cong. Rec., 66th Cong., 1st sess., vol. 58, pp. 8673, 8676. Mr. Esch, in the report of the measure to the House of Representatives, stated: "Without federal control, the carriers would have to be subjected to the diversified requirements of the several states. . . . The enactment of the pending bill will put the control over stock and bond issues exclusively in the hands of the Federal Government and will result in uniformity and greater promptness of action." Cong. Rec., 1st sess., House Report No. 456, p. 21.

Deficiencies Act (U. S. C., Tit. 28, § 47) and hence are not open to review on this appeal. *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U. S. 479, 488.

The remaining questions with respect to the adequacy of the rentals fixed, the other terms of the proposed leases, and the public interests involved, relate to the propriety of the action of the Commission in the exercise of its authority under the statute as construed. As to these matters the parties were fully heard, pertinent evidence was received and considered, and we find no basis for a contention that the order of the Commission was not adequately supported or had any confiscatory effect. *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663; *Georgia Commission* v. *United States,* 283 U. S. 765, 775.

Decree affirmed.

MOSHER *v.* CITY OF PHOENIX.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 6 and 7. Argued October 17, 1932.—Decided November 7, 1932.

1. Jurisdiction of the District Court upon the ground of federal question, is determined by the allegations of the bill, and not by the way the facts turn out or by a decision of the merits. P. 30.
2. Where a bill complaining of the attempted appropriation of plaintiff's land by a city as part of a street alleges that the city's action is without authority from the state law, but goes on to say that, under color of state authority, the city is attempting to take and appropriate the use of plaintiff's property and deprive him thereof without compensation or condemnation proceedings, and without due process of law, in violation of the Fourteenth Amendment, a substantial federal question is presented. P. 32.

54 F. (2d) 777, 778, reversed.

CERTIORARI, 285 U. S. 535, to review affirmances of two decrees of the District Court dismissing bills by which the

plaintiff sought to enjoin the city from appropriating land, as part of a street.

Mr. John W. Ray for petitioner.

Messrs. Sidman D. Barber and *John L. Gust* appeared for respondent.

Mr. Chief Justice Hughes delivered the opinion of the Court.

Decrees dismissing the bills of complaint for the want of jurisdiction were affirmed by the Circuit Court of Appeals, 54 F. (2d) 777, 778, and writs of certiorari were granted limited to the question of the jurisdiction of the District Court as a federal court. 285 U. S. 535.

There is no diversity of citizenship and jurisdiction depends upon the presentation by the bills of complaint of a substantial federal question. Jurisdiction is thus determined by the allegations of the bills and not by the way the facts turn out or by a decision of the merits. *Pacific Electric Ry. Co.* v. *Los Angeles,* 194 U. S. 112, 118; *Columbus Railway, Power & Light Co.* v. *Columbus,* 249 U. S. 399, 406; *South Covington & Cincinnati Street Ry. Co.* v. *Newport,* 259 U. S. 97, 99.

The suits were brought by petitioner as owner of parcels of land in the City of Phoenix, Arizona, to restrain the City from appropriating her land for purposes of a street improvement. The Circuit Court of Appeals, having decided in *Collins* v. *Phoenix,* 54 F. (2d) 770 (where jurisdiction of the federal court rested on diversity of citizenship), that the proceedings of the City were not authorized by the statutes of Arizona,[1] held in the instant cases that the petitioner, having alleged that the proceedings were void under the state law, had not presented a

[1] Compare decision of Supreme Court of Arizona in *Mosher* v. *Phoenix,* 7 P. (2d) 622.

substantial federal question. But petitioner did not stop with allegations as to the City's authority under state law. Petitioner also alleged, in No. 6, after setting forth her title, her claim as to the width of the street in question, and the action of the City in including her property as a part of the street and in contracting for the street improvement upon that basis, that the City was thereby "attempting to take and appropriate the property of plaintiff without compensation, and to take and appropriate and use same and deprive the said plaintiff of the permanent use thereof without due process of law, or any process of law, . . . and in violation of the rights of plaintiff as guaranteed her under the Constitution of the United States, and particularly under amendments five and fourteen thereof, which plaintiff here and now pleads and relies on for her protection against the wrongs and threatened wrongs of the defendant city in the proposed taking of her property as hereinbefore described." And this appeal to the Fourteenth Amendment was reiterated as against the action of the City which was alleged to have been taken "under the authority" of the "ordinances, resolutions and acts" set forth in the bill of complaint, it being also alleged that there had been no dedication or deed to the City and no proceedings for condemnation. Similar allegations of federal right, but more briefly stated, are found in the bill of complaint in No. 7.

In this respect the instant cases are similar to that of *Cuyahoga Power Co.* v. *Akron*, 240 U. S. 462, where the plaintiff, after setting forth provisions of the statutes and constitution of Ohio and concluding that the City had no constitutional power to take the property and franchises of the plaintiff and was exceeding the authority conferred by state law, further alleged that the City was attempting to take the plaintiff's property without compensation and was going forward with the enterprise in question in violation of the contract clause and Fourteenth Amendment

of the Constitution of the United States. This Court held that "whether the plaintiff has any rights that the City is bound to respect can be decided only by taking jurisdiction of the case" and that it was necessary for the District Court to deal with the merits. See, also, *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434; *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 246.

We are of the opinion that the allegations of the bills of complaint that the City acting under color of state authority was violating the asserted private right secured by the Federal Constitution, presented a substantial federal question and that it was error of the District Court to refuse jurisdiction.

Decrees reversed.

GULF STATES STEEL CO. ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 24. Argued October 20, 1932.—Decided November 7, 1932.

1. While a claim for abatement of a deficiency assessment was before the Commissioner of Internal Revenue, and when the period of limitation on collection was about to expire, the taxpayer, in order to secure delay and opportunity to present further proofs, filed a bond to indemnify the Collector against any resulting loss. After the period of limitation had run, the taxpayer filed a second bond, for the purpose of releasing the surety on the first and substituting a pledge of securities; then a third bond releasing the pledge and introducing another surety. Each of the later bonds recited the assessment, the pendency of the claim for abatement, and the preceding bond, and was conditioned upon payment to the Collector of such amount of the tax "as is not abated." Thereafter, the Commissioner rejected the claim for abatement and sustained the assessment; but the Board of Tax Appeals, which was not established until after the second bond had been given, held, at the instance of the taxpayer, that no tax deficiency existed, since collec-

tion was barred by limitations. The United States sued on the third bond. *Held:*

(1) The bonds must be construed together in the light of the circumstances. P. 42.

(2) The purpose of the later bonds was to continue the protection afforded by the first against any loss from delay, whether through extinguishment of rights under the statute of limitations or otherwise. *Id.*

(3) The possible abatement referred to was partial reduction or annulment of the assessment by the action of the Commissioner, or, possibly, by a decision of the Board of Tax Appeals on the merits. Pp. 43–44.

(4) The action of the Board of Tax Appeals, announcing the bar of the statute of limitations, at the instance of the taxpayer, but not determining the merits, was not an abatement within the meaning of the bonds. P. 44.

2. Section 906 (e) of the Revenue Act of 1924, as amended by the Acts of 1926 and 1928, which provides that if the assessment or collection of any tax is barred by limitations, the decision of the Board of Tax Appeals to that effect "shall be considered as its decision that there was no deficiency in respect of such tax," does not release the taxpayer and surety from a bond, given before the section was passed, for the purpose of protecting the United States from loss that might result from according the taxpayer further time within which to contest the validity of an assessment. Pp. 43, 45.

3. A literal construction of a statute leading to absurd results, should be avoided if possible. P. 45.

56 F. (2d) 43, affirmed.

CERTIORARI, 286 U. S. 536, to review the affirmance of a judgment recovered by the United States in an action on a bond.

Mr. John W. Drye, Jr., with whom *Messrs. John M. Perry* and *Augustus Benners* were on the brief, for petitioners. *Mr. James P. McGovern* also appeared for petitioners.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,*

Miss Helen R. Carloss, and *Messrs. Sewall Key* and *Erwin N. Griswold* were on the brief, for the United States.

Mr. John E. Hughes, by leave of Court, filed a brief as *amicus curiae.*

Mr. Justice McReynolds delivered the opinion of the court.

In the District Court for Alabama—August 25, 1930—the United States sued the Gulf States Steel Company, principal, and National Surety Company, surety,—petitioners here—upon a bond dated September 9, 1925, whereby they agreed to pay Snead, Collector of Internal Revenue, so much of the additional income and profits taxes for 1917 assessed by him against the principal in 1921 " as is not abated." Judgment on a verdict went for plaintiffs; the Circuit Court of Appeals affirmed; the matter is here by certiorari.

Petitioners say the sole question presented is whether the additional taxes were abated by the determination of the Board of Tax Appeals (July 10, 1928) in a proceeding brought by the Steel Company to review the Commissioner's final rejection of its demand for abatement. The Board held " that the respondent is now barred by statute from collecting any part of the additional assessment made in April, 1921, and that there is no deficiency for the year 1917." It directed entry of an order to that effect.

The petition for certiorari asserts: " The sole question in this case is whether the final decision of the Board that there was no deficiency ' abated ' the tax." The following is the only specification of error relied on here—" That the Court erred in holding that the claim for the deficiency of taxes was not abated by the final decision of the United States Board of Tax Appeals that there was no deficiency." And in their brief counsel for petitioners say—" The sole

question in this case is whether the final decision of the Board that there was no deficiency 'abated' the tax."

March 28, 1918, the Steel Company filed its income and excess profits tax return for 1917 and shortly thereafter paid the amount apparently due. In April, 1921, the Commissioner made a deficiency assessment of $153,815.30; May 6, 1921, the Company filed claim and demand for abatement of this entire sum upon the ground that the additional assessment was unwarranted and illegal in so far as it results—(1) From the failure to compute the invested capital by including the actual cash value of claimant's property on January 1, 1914; (2) From the action of the examiners in deducting only 7% of invested capital, instead of 8%; and (3) From disallowance of certain interest payments as part of invested capital.

March 13, 1923, fifteen days before the five-year statute would have barred collection of the deficiency assessment—the additional tax being wholly unpaid and the abatement claim undetermined—in order to secure delay and further consideration of objections, the taxpayer as principal, with the American Surety Company as surety, gave the Collector a bond for $175,350.00 which recites—

"The condition of the above obligation is such that, if the said Gulf States Steel Company will indemnify the said W. E. Snead as Collector as aforesaid, or his successor in office, against all loss, cost, damage, and expense to which he may be put by reason of having allowed the said Gulf States Steel Company to withhold the payment to him, as such Collector, of the sum of One Hundred and Fifty-three Thousand Eight Hundred Fifteen and 30/100 Dollars ($153,815.30), claimed of it under the War Revenue Act of 1917, pending the filing, by the said Gulf States Steel Company of additional facts and information in support of a claim for the abatement of said amount heretofore filed by it, then this obligation to be null and void, otherwise, to be and remain in full force and effect."

April 3, 1925, in order to obtain release of the American Surety Company from the above-described bond, also to

make certain the payment of whatever the Commissioner might thereafter finally declare to be payable under the deficiency assessment of 1921, the Steel Company executed a second obligation and pledged as security Two Hundred Thousand Dollars U. S. Liberty Loan Bonds. This obligation recites—

"Whereas the Gulf States Steel Company did execute a bond in the penal sum of One Hundred Seventy-five Thousand, Three Hundred and Fifty Dollars, ($175,350.00), and in favor of W. E. Snead, Collector of Internal Revenue, for the District of Alabama, which said bond was signed by the American Surety Company of New York, as surety, under date of the 13th day of March, 1923, and was given in support of a claim for the abatement of assessments, penalties and interests, under the Revenue Act of 1917. Being desirous of relieving the above bound surety Company and further securing the payment of any amount found to be due the United States government under the above Revenue Act, now, therefore, if the undersigned Gulf States Steel Company shall pay to W. E. Snead, Collector, or his successors in office, such amount of the claim as is not abated, together with all costs, damages, penalties, interest, or other expense connected therewith, then this obligation shall be void, otherwise it shall remain in full force and effect."

September 9, 1925, the Steel Company as principal, and National Surety Company as surety, executed the bond in suit, conditioned as follows—

"Whereas, an additional income tax has been assessed for the year 1917 in the sum of One Hundred Fifty-three Thousand Eight Hundred and Fifteen Dollars and Thirty Cents ($153,815.30), with penalty and interest against the Gulf States Steel Company of Birmingham, Alabama. A claim for the abatement of the additional tax was filed with the Collector of Internal Revenue for the District of Alabama at Birmingham. On the third day of April,

1925, the Gulf States Steel Company did execute its bond securing the payment of so much of the additional assessment, penalties and interest as is not abated. In lieu of surety on the above bond the said company did deposit with the Federal Reserve Bank of New York, under Section 1029 of the Revenue Act of 1924, the following described United States, Fourth Liberty Loan 4½% Gold Bonds of 1933–8 series, being of the par value of $200,000.00 (coupons), numbers . . . The above bonds were deposited on account and subject to the orders of W. E. Snead, Collector of Internal Revenue for the District of Alabama. Now, therefore, if W. E. Snead, Collector of Internal Revenue, shall release and surrender the said bonds to the said Company, and the principal, or sureties, either or both, shall pay to the said Collector so much of the amount of the claim as is not abated, together with penalties and interest thereon as provided by Law, then this obligation shall be of no effect. Otherwise, it shall remain in full force."

May 12, 1926, the Commissioner finally rejected *in toto* the Steel Company's long pending claim for abatement of the additional assessment of 1921 and gave proper notice. This notice among others things stated—" you are allowed 60 days (not counting Sunday as the sixtieth day) from the date of mailing of this letter within which to file a petition with the United States Board of Tax Appeals, Earle Building, Washington, D. C., contesting in whole or in part the correctness of this determination."

By an original petition to the Board of Tax Appeals, July 9, 1926, the Steel Company asked a "redetermination of the deficiency set forth by the respondent [Commissioner] in his notice of deficiency . . . dated May 12, 1926." The prayer follows—

" The petitioner prays for relief from the deficiency asserted by the respondent and from payment of the taxes

assessed in the following and each of the following particulars:

(a) That the petitioner be allowed as a deduction from its gross income for the year 1917, the sum of $47,021.82 as amortization of the cost to it of the lease (or stock) of Clinton Mining Company or as depletion or exhaustion of the leased properties based upon a cost of $145,000.00; or

(b) That the Clinton Mining Company be granted a reasonable allowance for the exhaustion or depletion of the leased properties based upon a March 1, 1913, value of the leasehold, and that amount so allowed be deducted in computing the consolidated net income of the petitioner and Clinton Mining Company for the year 1917:

(c) That the petitioner be allowed $11,000,000.00 in computing its invested capital for 1917, on account of the property paid in for stock on December 1, 1913.

Wherefore petitioner prays that this Board may hear and determine the deficiency herein alleged."

By an amended petition, March 2, 1927, (after *Bowers* v. *New York & Albany Lighterage Co.*, February, 1927, 273 U. S. 346,) the Steel Company renewed its request for "a redetermination of the deficiency set forth by the respondent in his notice of deficiency" dated May 12, 1926.

The petitions are identical except the amended one contains two new paragraphs which allege extinguishment through the Statute of Limitations of all liability of the Steel Company for the additional taxes; also the following new prayer—

"(d) That the Board determine that the liability of the petitioner for the payment of the alleged deficiency has been extinguished by the running of the Statute of Limitations upon its collection and/or that the collection of said alleged deficiency was barred at the expiration of five years after said returns were filed."

The Board of Tax Appeals in July, 1928, held—"None of the bonds in the instant case can be said to constitute a consent in writing by both the Commissioner and the taxpayer to a later determination, assessment and collection of the tax in question, and no other exception to the running of the statute of limitations provided in any of the Acts being present, and no suit or proceeding for the collection of tax having been begun prior to the expiration of five years from the date of filing the return, and the five-year period having expired prior to the passage of the Revenue Act of 1924, we hold that the respondent is now barred by statute from collecting any part of the additional assessment made in April, 1921, and that there is no deficiency for the year 1917. *Bowers* v. *New York & Albany Lighterage Co.*, [273 U. S. 346]; C. B. Shaffer *v.* Commissioner, [12 B. T. A. 298]; *United States* v. *The John Barth Co.* [279 U. S. 370]; Art Metal Works *v.* Commissioner, 9 B. T. A. 491. Our decision in this respect in no wise disposes of any questions arising as to liability on the bond." The consequent formal entry recites—"It is ordered and adjudged that the collection of the deficiency, if any, in income and excess profits taxes for the year 1917 is barred by the statute of Limitations . . ."

Bowers v. *New York & Albany Lighterage Co.*, February 21, 1927, 273 U. S. 346, construed the provision, Revenue Act 1921, prohibiting suit or proceeding for the collection of income or excess profits taxes after five years subsequent to the return and held it applied both to suits in court and to distraint proceedings. Prior to this, tax officers went upon the view that the statute of limitations did not apply to distraint.

United States v. *John Barth Co.*, 279 U. S. 370, May 13, 1929, ruled that the limitation in Revenue Acts 1918, 1919, 1921 and 1924 upon the time within which income and

excess profits taxes may be assessed and suits begun to collect is inapplicable where the suit is upon a bond given to secure payment of taxes theretofore returned and assessed, in order to obtain postponement of payment pending decision upon claim for abatement; also, that a bond made in such circumstances affords a cause of action separate and distinct from one to collect the tax.

Prior to 1924, in order to contest the Commissioner's assessment, the taxpayer had to pay the sum demanded and bring suit to recover. *Graham* v. *du Pont*, 262 U. S. 234, 258.

Title IX—Board of Tax Appeals—Act June 2, 1924, c. 234, 43 Stat. 253, 336, established the Board of Tax Appeals and authorized it to hear appeals from the Commissioner's action in respect of deficiencies before payments, etc. Under this act if the Board disallowed an alleged deficiency, thereafter the Commissioner could enforce collection only by suit in court.

The Revenue Act, February 26, 1926—Title X; Board of Tax Appeals—c. 27, 44 Stat. 9, 105, 107 amended Title IX—Board of Tax Appeals, Organization and Procedure—Act of 1924, supra, by adding thereto, among other things (under subtitle "Organization and Procedure") the following wholly new paragraph—"Sec. 906 (e). If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall, for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that there is no deficiency in respect of such tax." Sec. 274 (a) and (b) of this Act are in the margin.*

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*"Sec. 274 (a). If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a

The Revenue Act, May 29, 1928, "Title IV—Administrative Provisions," 45 Stat. 791, 871, 872, c. 852, amended the above quoted § 906 (e) to read—"If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax."

The original Complaint in the present cause alleges that the Steel Company's claim for abatement of the additional assessment for the year 1917 was rejected by the Commissioner May 12, 1926, "for the full amount thereof, whereby there remained unpaid and unabated of the said assessment One Hundred Fifty-three Thousand, Eight Hundred Fifteen Dollars and Thirty Cents ($153,815.30), which said finding and determination of the Commissioner of Internal Revenue rejecting said claim for abatement has remained and now is in full force, vigor and effect, unvacated, unreversed and unmodified and is subject to no credits, set-offs or counterclaims other than here-

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redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

"(b). If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment."

inafter set forth." Petitioners denied this allegation. They maintained that the Commissioner's action had been reversed and the additional taxes abated by the opinion and ruling of the Board of Tax Appeals and this seems to have been the only point relied upon in the Circuit Court of Appeals which rejected petitioners' theory and approved the challenged judgment on the bond.

Concerning the Board's action that court said [p. 45]— "This is not a finding that the tax or any part of it should be abated. It does not abate any part of it. It is but a formal judgment that the tax, as tax, is, because the bar of limitation has fallen, not collectible. Since it is this and no more, it has the effect upon the suit on the bond here, and no more, that the fact found in the Barth case and the legal conclusion there announced, that time had run against the tax and that it was therefore uncollectible, had on the suit on the bond there."

The bond in suit must be construed in the light of surrounding circumstances. *Hill* v. *American Surety Co.*, 200 U. S. 197, 203, 204, 205. They are narrated above.

As in *United States* v. *Barth Co., supra,* the plain purpose of the first bond—March 13, 1923—was to prevent immediate collection of the assessed additional taxes and to provide against any loss which might follow delay whether through extinguishment of rights under the Statute of Limitations or otherwise. We think it sufficiently clear that the two succeeding bonds were intended to continue the protection afforded by the first. The taxpayer, having attained its purpose through these bonds, now claims that the United States cannot enforce the obligation which induced the delay contemplated by all parties. It seeks escape through literal construction of a statute evidently designed to protect taxpayers in different circumstances.

Considering the state of the record, it is only necessary now to pass on one point—Were "the additional assessments, penalties and interest" "abated" by the Board of

Tax Appeals' final determination, within the meaning of the bond in suit. Unless this is answered in the affirmative, the judgment below must stand. There is no suggestion that it should be upset upon any other ground.

Petitioners maintain that the Board had jurisdiction of the appeal from the Commissioner; that it definitely ruled "the collection of the deficiency, if any, of income and excess profits taxes for the year 1917 is barred by the Statute of Limitations" and that the necessary result of this ruling was abatement of the additional assessments, mentioned in the 1925 bond. This conclusion, they say, is inescapable under the clear mandate of § 906 (e), Revenue Act of 1924, as amended by the Acts of 1926 and 1928—"If the assessment or collection of any tax is barred by any Statute of Limitations the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax."

As the provisions of § 906 (e) first came into the law after execution of the bond, they could not then have been within contemplation of the parties. The bond of 1925, like the two preceding ones, was given to protect the United States against loss; it referred to the tax liability existing March 13, 1923,—$153,815.30—and was intended to guarantee payment of that sum unless reduced or annulled by some future action of the Commissioner. Payment might have been enforced; but the taxpayer claimed the amount assessed was too high and procured further delay for investigation by executing the bond. The possible abatement—partial reduction or annulment—there referred to depended upon the future decision of the Commissioner.

On appeal to the Board the taxpayer challenged the assessment as erroneous; also, because under the Statute of Limitations there remained no right to enforce the tax. As to the first ground, the Board found nothing. It declared only that the Statute had run against the right to collect the tax—this upon the taxpayer's prayer. In no

proper sense was there a redetermination of the deficiency assessed in 1923. The anticipated bar of the tax by the Statute could not affect the controversy—was not the point in issue, was not disputed. The bond required payment of a stated sum under the assessment already made, unless this should be abated by the Commissioner. What abatement should be allowed was the matter before him and a reëxamination of his determination was necessarily limited to those matters which might have been presented to him. By the prayer based on the statute of limitations the taxpayer defeated a determination of the real controversy.

In the circumstances, possibly, a decision upon the merits might have been regarded as the Commissioner's action within the implication of the bond. The effective scope of the decision rendered is no broader than the issue, opinion and findings. It left undisturbed the Commissioner's assessment of 1923. This the bond undertook to pay wholly without regard to the right to enforce the tax as such.

The existence of the bar under the Statute, as against the lien or right to enforce the tax as such, was never the subject of controversy—was not denied. And as the present suit is not to enforce the tax as such, but an obligation given in contemplation of the loss of right to enforce, a decision proclaiming this loss is but announcement of something expected by all parties—an unfruitful pronouncement upon an immaterial point. *United States* v. *Barth Co., supra.* See *United States* v. *Martin Hotel Co.*, 59 F. (2d) 549. As the Board failed to pass upon the Commissioner's refusal to reduce the amount of the assessment, that sum, with interest, etc., now represents what is due upon the bond. The Board expressly disclaimed purpose to rule concerning this obligation—the question was not present. It might, with propriety, have examined the objections to the amount of the 1923 assessment; but the taxpayer asked another course.

Section 906 (e) may find proper application on an ordinary appeal, as for example, where the Commissioner's right to assess is challenged because the Statute of Limitations had run, or where, as in *Bowers* v. *New York & Albany Lighterage Co., supra,* the Collector asserts the right to enforce payment by distraint after the statutory bar. It can have no application to what may have been said or done by the Board when undertaking to redetermine a deficiency having no possible relation to the Statute of Limitations.

The literal construction of § 906 (e) proposed by the petitioners would lead to consequences manifestly unjust, if not absurd. When the bond in suit was executed the Statute had extinguished the right of the United States to enforce the tax as such. That Congress thereafter actually intended to release the parties whenever the Board should declare this fact is beyond belief. The thing announced by the Board had no real relation to the obligation of the bond. When possible, every statute should be rationally interpreted with the view of carrying out the legislative intent. We cannot attribute to Congress the purpose necessary to support petitioners' urgence.

Affirmed.

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, AND OLEN MONTGOMERY *v.* ALABAMA.

HAYWOOD PATTERSON *v.* SAME.

CHARLEY WEEMS AND CLARENCE NORRIS *v.* SAME.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

Nos. 98, 99, and 100. Argued October 10, 1932.—Decided November 7, 1932.

1. The rule denying the aid of counsel to persons charged with felony, which (except as to legal questions) existed in England

when our Constitution was formed, was rejected in this country by the Colonies before the Declaration of Independence, and is not a test of whether the right to counsel in such cases is embraced in the guarantee of "due process of law." P. 65.

2. The rule that no part of the Constitution shall be treated as superfluous is an aid to construction which, in some instances, may be conclusive, but which must yield to more compelling considerations whenever they exist. P. 67.

3. The fact that the right of an accused person to have counsel for his defense was guaranteed expressly (as respects the federal Government) by the Sixth Amendment, notwithstanding the presence of the due process clause in the Fifth Amendment, does not exclude that right from the concept "due process of law." Pp. 66–68.

4. The right of the accused, at least in a capital case, to have the aid of counsel for his defense, which includes the right to have sufficient time to advise with counsel and to prepare a defense, is one of the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment. Pp. 68–71.

5. In a capital case, where the defendant is unable to employ counsel, and is incapable of making his own defense adequately because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time and under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. P. 71.

6. In a case such as this, the right to have counsel appointed, when necessary, is a logical corollary to the right to be heard by counsel. P. 72.

7. In such circumstances, the trial court has power, even in the absence of statute, to appoint an attorney for the accused; and the attorney, as an officer of the court, is bound to serve. P. 73.

224 Ala. 524, 531, 540, reversed.

CERTIORARI, 286 U. S. 540, to review judgments affirming sentences to death based upon convictions for rape. There was one indictment against these petitioners and two other persons. The petitioners were tried in three groups, as shown in the caption, pursuant to an order of severance obtained by the State.

Mr. Walter H. Pollak, with whom *Messrs. Carl S. Stern* and *George W. Chamlee* were on the brief, for petitioners.

Mr. Thomas E. Knight, Jr., Attorney General of Alabama, with whom *Mr. Thos. Seay Lawson,* Assistant Attorney General, was on the brief, for respondent.

The phrase "due process of law" antedates the establishment of our institutions. It embodies one of the broadest and most far reaching guaranties of personal and property rights. It is necessary for the enjoyment of life, liberty and property that this constitutional guaranty be strictly complied with. However, it is imperative that this Court under our system of government see that the States be not restricted in their method of administering justice in so far as they do not act arbitrarily and discriminatingly. *Frank* v. *Mangum,* 237 U. S. 309; *Holden* v. *Hardy,* 169 U. S. 366, 389; *Missouri* v. *Lewis,* 101 U. S. 22, 31; *Hurtado* v. *California,* 110 U. S. 516, 535.

A defendant in a criminal case has been accorded due process of law when there is a law creating or defining the offense, a court of competent jurisdiction, accusation in due form, notice and opportunity to answer the charge, trial according to the established course of judicial proceedings, and a right to be discharged unless found guilty. No particular form of procedure is required. The question of due process is determined by the law of the jurisdiction where the offense was committed and the trial was had. *Missouri* v. *Lewis,* 101 U. S. 22; *Hurtado* v. *California,* 110 U. S. 516; *Brown* v. *New Jersey,* 175 U. S. 172; *Jordan* v. *Massachusetts,* 225 U. S. 167; *Rogers* v. *Peck,* 199 U. S. 425; *Garland* v. *Washington,* 232 U. S. 642; *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40; *Miller* v. *Texas,* 153 U. S. 535; *Ong Chang Wing* v. *United States,* 218 U. S. 272; *Hodgson* v. *Vermont,* 168 U. S. 262.

Here the trials were in accordance with the constitution and statutes of Alabama, the provisions of which are in no way attacked as being unconstitutional. They were conducted in compliance with the rules, practice, and procedure long prevailing in the State. The court of last resort decided these cases in compliance with those rules of appeal and error which they apply in all cases.

Under the laws of Alabama the petitioners were entitled to counsel. Const., Art. 1, § 6. When it appears that a defendant charged with a capital offense has not employed counsel, it is the duty of the court to appoint attorneys for his defense. Code (1923), § 5567. A compliance with this section is shown. At the time of the arraignment there were nine defendants; and while the record does not disclose the number of attorneys practising at the Scottsboro bar, we venture to say that there were not as many as eighteen attorneys at that bar, the number which the court could have appointed under the statute.

If there had been only one defendant, it does not seem plausible to us that he could correctly contend that he had been denied due process of law because the court appointed more than two lawyers to represent him. This was at most, a mere irregularity which would not invalidate a conviction.

The petitioners were represented by counsel from Chattanooga and by two members of the bar of Scottsboro. They were not put to trial until one week after counsel were appointed. The record affirmatively shows that counsel had conferred with them and had done everything that they knew how to do. *Henry Ching* v. *United States,* 264 Fed. 639, cert. den., 254 U. S. 630.

There was no demand or motion made for a continuance. The defendants were represented by capable counsel, one of whom has enjoyed a long and successful prac-

tise before the courts of Jackson County. Counsel, by their own statements, show that they not only had time for preparation of their case, but that they knew and proceeded along proper lines for a week prior to the trial.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases were argued together and submitted for decision as one case.

The petitioners, hereinafter referred to as defendants, are negroes charged with the crime of rape, committed upon the persons of two white girls. The crime is said to have been committed on March 25, 1931. The indictment was returned in a state court of first instance on March 31, and the record recites that on the same day the defendants were arraigned and entered pleas of not guilty. There is a further recital to the effect that upon the arraignment they were represented by counsel. But no counsel had been employed, and aside from a statement made by the trial judge several days later during a colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed. During the colloquy referred to, the trial judge, in response to a question, said that he had appointed all the members of the bar for the purpose of arraigning the defendants and then of course anticipated that the members of the bar would continue to help the defendants if no counsel appeared. Upon the argument here both sides accepted that as a correct statement of the facts concerning the matter.

There was a severance upon the request of the state, and the defendants were tried in three several groups, as indicated above. As each of the three cases was called for trial, each defendant was arraigned, and, having the

indictment read to him, entered a plea of not guilty. Whether the original arraignment and pleas were regarded as ineffective is not shown. Each of the three trials was completed within a single day. Under the Alabama statute the punishment for rape is to be fixed by the jury, and in its discretion may be from ten years imprisonment to death. The juries found defendants guilty and imposed the death penalty upon all. The trial court overruled motions for new trials and sentenced the defendants in accordance with the verdicts. The judgments were affirmed by the state supreme court. Chief Justice Anderson thought the defendants had not been accorded a fair trial and strongly dissented. 224 Ala. 524; *id.* 531; *id.* 540; 141 So. 215, 195, 201.

In this court the judgments are assailed upon the grounds that the defendants, and each of them, were denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment, specifically as follows: (1) they were not given a fair, impartial and deliberate trial; (2) they were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial; and (3) they were tried before juries from which qualified members of their own race were systematically excluded. These questions were properly raised and saved in the courts below.

The only one of the assignments which we shall consider is the second, in respect of the denial of counsel; and it becomes unnecessary to discuss the facts of the case or the circumstances surrounding the prosecution except in so far as they reflect light upon that question.

The record shows that on the day when the offense is said to have been committed, these defendants, together with a number of other negroes, were upon a freight train on its way through Alabama. On the same train were seven white boys and the two white girls. A fight took

place between the negroes and the white boys, in the course of which the white boys, with the exception of one named Gilley, were thrown off the train. A message was sent ahead, reporting the fight and asking that every negro be gotten off the train. The participants in the fight, and the two girls, were in an open gondola car. The two girls testified that each of them was assaulted by six different negroes in turn, and they identified the seven defendants as having been among the number. None of the white boys was called to testify, with the exception of Gilley, who was called in rebuttal.

Before the train reached Scottsboro, Alabama, a sheriff's posse seized the defendants and two other negroes. Both girls and the negroes then were taken to Scottsboro, the county seat. Word of their coming and of the alleged assault had preceded them, and they were met at Scottsboro by a large crowd. It does not sufficiently appear that the defendants were seriously threatened with, or that they were actually in danger of, mob violence; but it does appear that the attitude of the community was one of great hostility. The sheriff thought it necessary to call for the militia to assist in safeguarding the prisoners. Chief Justice Anderson pointed out in his opinion that every step taken from the arrest and arraignment to the sentence was accompanied by the military. Soldiers took the defendants to Gadsden for safekeeping, brought them back to Scottsboro for arraignment, returned them to Gadsden for safekeeping while awaiting trial, escorted them to Scottsboro for trial a few days later, and guarded the court house and grounds at every stage of the proceedings. It is perfectly apparent that the proceedings, from beginning to end, took place in an atmosphere of tense, hostile and excited public sentiment. During the entire time, the defendants were closely confined or were under military guard. The record does not disclose their ages, except that one of them was nineteen; but the

record clearly indicates that most, if not all, of them were youthful, and they are constantly referred to as "the boys." They were ignorant and illiterate. All of them were residents of other states, where alone members of their families or friends resided.

However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial. With any error of the state court involving alleged contravention of the state statutes or constitution we, of course, have nothing to do. The sole inquiry which we are permitted to make is whether the federal Constitution was contravened (*Rogers* v. *Peck*, 199 U. S. 425, 434; *Hebert* v. *Louisiana*, 272 U. S. 312, 316); and as to that, we confine ourselves, as already suggested, to the inquiry whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment.

First. The record shows that immediately upon the return of the indictment defendants were arraigned and pleaded not guilty. Apparently they were not asked whether they had, or were able to employ, counsel, or wished to have counsel appointed; or whether they had friends or relatives who might assist in that regard if communicated with. That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavor to obtain counsel is demonstrated by the fact that, very soon after conviction, able counsel appeared in their behalf. This was pointed out by Chief Justice Anderson in the course of his dissenting opinion. "They were nonresidents," he said, "and had little time or opportunity to get in touch with their families and friends who were scattered throughout two other states, and time has dem-

onstrated that they could or would have been represented by able counsel had a better opportunity been given by a reasonable delay in the trial of the cases, judging from the number and activity of counsel that appeared immediately or shortly after their conviction." 224 Ala., at pp. 554–555; 141 So. 201.

It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. This will be amply demonstrated by a brief review of the record.

April 6, six days after indictment, the trials began. When the first case was called, the court inquired whether the parties were ready for trial. The state's attorney replied that he was ready to proceed. No one answered for the defendants or appeared to represent or defend them. Mr. Roddy, a Tennessee lawyer not a member of the local bar, addressed the court, saying that he had not been employed, but that people who were interested had spoken to him about the case. He was asked by the court whether he intended to appear for the defendants, and answered that he would like to appear along with counsel that the court might appoint. The record then proceeds:

"The Court: If you appear for these defendants, then I will not appoint counsel; if local counsel are willing to appear and assist you under the circumstances all right, but I will not appoint them.

"Mr. Roddy: Your Honor has appointed counsel, is that correct?

"The Court: I appointed all the members of the bar for the purpose of arraigning the defendants and then of course I anticipated them to continue to help them if no counsel appears.

"Mr. Roddy: Then I don't appear then as counsel but I do want to stay in and not be ruled out in this case.

"The Court: Of course I would not do that—

"Mr. Roddy: I just appear here through the courtesy of Your Honor.

"The Court: Of course I give you that right; . . ."

And then, apparently addressing all the lawyers present, the court inquired:

". . . well are you all willing to assist?

"Mr. Moody: Your Honor appointed us all and we have been proceeding along every line we know about it under Your Honor's appointment.

"The Court: The only thing I am trying to do is, if counsel appears for these defendants I don't want to impose on you all, but if you feel like counsel from Chattanooga—

"Mr. Moody: I see his situation of course and I have not run out of anything yet. Of course, if Your Honor purposes to appoint us, Mr. Parks, I am willing to go on with it. Most of the bar have been down and conferred with these defendants in this case; they did not know what else to do.

"The Court: The thing, I did not want to impose on the members of the bar if counsel unqualifiedly appears; if you all feel like Mr. Roddy is only interested in a limited way to assist, then I don't care to appoint—

"Mr. Parks: Your Honor, I don't feel like you ought to impose on any member of the local bar if the defendants are represented by counsel.

"The Court: That is what I was trying to ascertain, Mr. Parks.

"Mr. Parks: Of course if they have counsel, I don't see the necessity of the Court appointing anybody; if they haven't counsel, of course I think it is up to the Court to appoint counsel to represent them.

"The Court: I think you are right about it Mr. Parks and that is the reason I was trying to get an expression from Mr. Roddy.

"Mr. Roddy: I think Mr. Parks is entirely right about it, if I was paid down here and employed, it would be a different thing, but I have not prepared this case for trial and have only been called into it by people who are interested in these boys from Chattanooga. Now, they have not given me an opportunity to prepare the case and I am not familiar with the procedure in Alabama, but I merely came down here as a friend of the people who are interested and not as paid counsel, and certainly I haven't any money to pay them and nobody I am interested in had me to come down here has put up any fund of money to come down here and pay counsel. If they should do it I would be glad to turn it over—a counsel but I am merely here at the solicitation of people who have become interested in this case without any payment of fee and without any preparation for trial and I think the boys would be better off if I step entirely out of the case according to my way of looking at it and according to my lack of preparation of it and not being familiar with the procedure in Alabama, . . ."

Mr. Roddy later observed:

"If there is anything I can do to be of help to them, I will be glad to do it; I am interested to that extent.

"The Court: Well gentlemen, if Mr. Roddy only appears as assistant that way, I think it is proper that I appoint members of this bar to represent them, I expect that is right. If Mr. Roddy will appear, I wouldn't of course, I would not appoint anybody. I don't see, Mr. Roddy, how I can make a qualified appointment or a limited appointment. Of course, I don't mean to cut off your assistance in any way—Well gentlemen, I think you understand it.

"Mr. Moody: I am willing to go ahead and help Mr. Roddy in anything I can do about it, under the circumstances.

"The Court: All right, all the lawyers that will; of course I would not require a lawyer to appear if—

"Mr. Moody: I am willing to do that for him as a member of the bar; I will go ahead and help do anything I can do.

"The Court: All right."

And in this casual fashion the matter of counsel in a capital case was disposed of.

It thus will be seen that until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants. Prior to that time, the trial judge had "appointed all the members of the bar" for the limited "purpose of arraigning the defendants." Whether they would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court. Such a designation, even if made for all purposes, would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel. How many lawyers were members of the bar does not appear; but, in the very nature of things, whether many or few, they would not, thus collectively named, have been given that clear appreciation of responsibility or impressed with that individual sense of duty which should and naturally would accompany the appointment of a selected member of the bar, specifically named and assigned.

That this action of the trial judge in respect of appointment of counsel was little more than an expansive gesture, imposing no substantial or definite obligation upon any one, is borne out by the fact that prior to the calling of the case for trial on April 6, a leading member of the local bar accepted employment on the side of the prosecution

and actively participated in the trial. It is true that he said that before doing so he had understood Mr. Roddy would be employed as counsel for the defendants. This the lawyer in question, of his own accord, frankly stated to the court; and no doubt he acted with the utmost good faith. Probably other members of the bar had a like understanding. In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself. *People ex rel. Burgess* v. *Risley,* 66 How. Pr. (N. Y.) 67; *Batchelor* v. *State,* 189 Ind. 69, 76; 125 N. E. 773.

Nor do we think the situation was helped by what occurred on the morning of the trial. At that time, as appears from the colloquy printed above, Mr. Roddy stated to the court that he did not appear as counsel, but that he would like to appear along with counsel that the court might appoint; that he had not been given an opportunity to prepare the case; that he was not familiar with the procedure in Alabama, but merely came down as a friend of the people who were interested; that he thought the boys would be better off if he should step entirely out of the case. Mr. Moody, a member of the local bar, expressed a willingness to help Mr. Roddy in anything he could do under the circumstances. To this the court responded, "All right, all the lawyers that will; of course I would not require a lawyer to appear if—." And Mr. Moody continued, "I am willing to do that for him as a member of the bar; I will go ahead and help do any thing I can do." With this dubious understanding, the trials immediately proceeded. The defendants, young, igno-

rant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.

It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: ". . . the record indicates that the appearance was rather *pro forma* than zealous and active . . ." Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities. This conclusion finds ample support in the reasoning of an overwhelming array of state decisions, among which we cite the following: *Sheppard* v. *State,* 165 Ga. 460, 464; 141 S. E. 196; *Reliford* v. *State,* 140 Ga. 777; 79 S. E. 1128; *McArver* v. *State,* 114 Ga. 514; 40 S. E. 779; *Sanchez* v. *State,* 199 Ind. 235, 246; 157 N. E. 1; *Batchelor* v. *State,* 189 Ind. 69, 76; 125 N. E. 773; *Mitchell* v. *Commonwealth,* 225 Ky. 83; 7 S. W. (2d) 823; *Jackson* v. *Commonwealth,* 215 Ky. 800; 287 S. W. 17; *State* v. *Collins,* 104 La. 629; 29 So. 180; *State* v. *Pool,* 50 La. Ann. 449; 23 So. 503; *People ex rel. Burgess* v. *Risley,* 66 How. Pr. (N. Y.) 67; *State ex rel. Tucker* v. *Davis,* 9 Okla. Cr. 94; 130 Pac. 962; *Commonwealth* v. *O'Keefe,* 298 Pa. 169;

148 Atl. 73; *Shaffer* v. *Territory,* 14 Ariz. 329, 333; 127 Pac. 746.

It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

As the court said in *Commonwealth* v. *O'Keefe,* 298 Pa. 169, 173; 148 Atl. 73:

"It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.

. . . . . .

"A prompt and vigorous administration of the criminal law is commendable and we have no desire to clog the wheels of justice. What we here decide is that to force a defendant, charged with a serious misdemeanor, to trial within five hours of his arrest, is not due process of law, regardless of the merits of the case."

Compare *Reliford* v. *State,* 140 Ga. 777, 778; 79 S. E. 1128.

Second. The Constitution of Alabama provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel; and a state statute requires the court in a capital case, where the defendant

is unable to employ counsel, to appoint counsel for him. The state supreme court held that these provisions had not been infringed, and with that holding we are powerless to interfere. The question, however, which it is our duty, and within our power, to decide, is whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the federal Constitution.

If recognition of the right of a defendant charged with a felony to have the aid of counsel depended upon the existence of a similar right at common law as it existed in England when our Constitution was adopted, there would be great difficulty in maintaining it as necessary to due process. Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel. After the revolution of 1688, the rule was abolished as to treason, but was otherwise steadily adhered to until 1836, when by act of Parliament the full right was granted in respect of felonies generally. 1 Cooley's Const. Lim., 8th ed., 698, *et seq.*, and notes.

An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers. As early as 1758, Blackstone, although recognizing that the rule was settled at common law, denounced it as not in keeping with the rest of the humane treatment of prisoners by the English law. "For upon what face of reason," he says, "can that assistance be denied

to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?" 4 Blackstone 355. One of the grounds upon which Lord Coke defended the rule was that in felonies the court itself was counsel for the prisoner. 1 Cooley's Const. Lim., *supra.* But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

The rule was rejected by the colonies. Before the adoption of the federal Constitution, the Constitution of Maryland had declared "That, in all criminal prosecutions, every man hath a right . . . to be allowed counsel; . . ." (Art. XIX, Constitution of 1776). The Constitution of Massachusetts, adopted in 1780 (Part the First, Art. XII), the Constitution of New Hampshire, adopted in 1784 (Part I, Art. XV), the Constitution of New York of 1777 (Art. XXXIV), and the Constitution of Pennsylvania of 1776 (Art. IX), had also declared to the same effect. And in the case of Pennsylvania, as early as 1701, the Penn Charter (Art. V) declared that "all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors"; and there was also a provision in the Pennsylvania statute of May 31, 1718 (Dallas, Laws of Pennsylvania, 1700–1781, Vol. 1, p. 134), that in capital cases learned counsel should be assigned to the prisoners.

In Delaware, the Constitution of 1776 (Art. 25), adopted the common law of England, but expressly excepted such parts as were repugnant to the rights and privileges contained in the Declaration of Rights; and the Declaration of Rights, which was adopted on September

11, 1776, provided (Art. 14), "That in all Prosecutions for criminal Offences, every Man hath a Right . . . to be allowed Counsel, . . ." In addition, Penn's Charter, already referred to, was applicable in Delaware. The original Constitution of New Jersey of 1776 (Art. XVI) contained a provision like that of the Penn Charter, to the effect that all criminals should be admitted to the same privileges of counsel as their prosecutors. The original Constitution of North Carolina (1776) did not contain the guarantee, but c. 115, § 85, Sess. Laws, N. Car., 1777 (N. Car. Rev. Laws, 1715–1796, Vol. 1, 316), provided ". . . That every person accused of any crime or misdemeanor whatsoever, shall be entitled to council in all matters which may be necessary for his defence, as well to facts as to law; . . ." Similarly, in South Carolina the original Constitution of 1776 did not contain the provision as to counsel, but it was provided as early as 1731 (Act of August 20, 1731, § XLIII, Grimke, S. Car. Pub. Laws, 1682–1790, p. 130) that every person charged with treason, murder, felony, or other capital offense, should be admitted to make full defense by counsel learned in the law. In Virginia there was no constitutional provision on the subject, but as early as August, 1734 (c. VII, § III, Laws of Va., 8th Geo. II, Hening's Stat. at Large, Vol. 4, p. 404), there was an act declaring that in all trials for capital offenses the prisoner, upon his petition to the court, should be allowed counsel.

The original Constitution of Connecticut (Art. I, § 9) contained a provision that "In all criminal prosecutions, the accused shall have the right to be heard by himself and by counsel"; but this constitution was not adopted until 1818. However, it appears that the English common law rule had been rejected in practice long prior to 1796. See Zephaniah Swift's "A System of the Laws of the State of Connecticut," printed at Windham by John

Byrne, 1795–1796, Vol. II, Bk. 5, "Of Crimes and Punishments," c. XXIV, "Of Trials," pp. 398–399.*

The original Constitution of Georgia (1777) did not contain a guarantee in respect of counsel, but the Constitution of 1798 (Art. III, § 8) provided that " . . . no person shall be debarred from advocating or defending his cause before any court or tribunal, either by himself or counsel, or both." What the practice was prior to 1798 we are unable to discover. The first constitution adopted by Rhode Island was in 1842, and this constitution contained the usual guarantee in respect of the assistance of counsel in criminal prosecutions. As early as 1798 it was provided by statute, in the very language of the Sixth Amendment to the Federal Constitution, that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence;

* This ancient work, consisting of six books, has long been out of print. A copy of it is preserved in the locked files of the Library of Congress. The following extract from the pages cited is both interesting and instructive:

"The attorney for the state then proceeds to lay before the jury, all the evidence against the prisoner, without any remarks or arguments. The prisoner by himself or counsel, is then allowed to produce witnesses to counteract and obviate the testimony against him; and to exculpate himself with the same freedom as in civil cases. We have never admitted that cruel and illiberal principle of the common law of England that when a man is on trial for his life, he shall be refused counsel, and denied those means of defence, which are allowed, when the most trifling pittance of property is in question. The flimsy pretence, that the court are to be counsel for the prisoner will only highten our indignation at the practice: for it is apparent to the least consideration, that a court can never furnish a person accused of a crime with the advice, and assistance necessary to make his defence. This doctrine might with propriety have been advanced, at the time when by the common law of England, no witnesses could be adduced on the part of the prisoner, to manifest his innocence, for he could then make no preparation for his defense. One cannot read without horror and astonishment, the abominable maxims of law, which de-

. . ." An Act Declaratory of certain Rights of the People of this State, § 6, Rev. Pub. Laws, Rhode Island and Providence Plantations, 1798. Furthermore, while the statute itself is not available, it is recorded as a matter of history that in 1668 or 1669 the colonial assembly enacted that any person who was indicted might employ an attorney to plead in his behalf. 1 Arnold, History of Rhode Island, 336.

It thus appears that in at least twelve of the thirteen colonies the rule of the English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all

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prived persons accused, and on trial for crimes, of the assistance of counsel, except as to points of law, and the advantage of witnesses to exculpate themselves from the charge. It seems by the ancient practice, that whenever a person was accused of a crime, every expedient was adopted to convict him and every privilege denied him, to prove his innocence. In England, however, as the law now stands, prisoners are allowed the full advantage of witnesses, but excepting in a few cases, the common law is enforced, in denying them counsel, except as to points of law.

"Our ancestors, when they first enacted their laws respecting crimes, influenced by the illiberal principles which they had imbibed in their native country, denied counsel to prisoners to plead for them to anything but points of law. It is manifest that there is as much necessity for counsel to investigate matters of fact, as points of law, if truth is to be discovered.

"The legislature has become so thoroughly convinced of the impropriety and injustice of shackling and restricting a prisoner with respect to his defence, that they have abolished all those odious laws, and every person when he is accused of a crime, is entitled to every possible privilege in making his defence, and manifesting his innocence, by the instrumentality of counsel, and the testimony of witnesses."

The early statutes of Connecticut, upon examination, do not seem to be as clear as this last paragraph would indicate; but Mr. Swift, writing in 1796, was in a better position to know how the statutes had been interpreted and applied in actual practice than the reader of today; and we see no reason to reject his statement.

criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes; and this court seems to have been of the opinion that this was true in all the colonies. In *Holden* v. *Hardy,* 169 U. S. 366, 386, Mr. Justice Brown, writing for the court, said:

"The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there."

One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation. *Lowe* v. *Kansas,* 163 U. S. 81, 85. Compare *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. 272, 276–277; *Twining* v. *New Jersey,* 211 U. S. 78, 100–101. Plainly, as appears from the foregoing, this test, as thus qualified, has not been met in the present case.

We do not overlook the case of *Hurtado* v. *California,* 110 U. S. 516, where this court determined that due process of law does not require an indictment by a grand jury as a prerequisite to prosecution by a state for murder. In support of that conclusion the court (pp. 534–535) referred to the fact that the Fifth Amendment, in addition to containing the due process of law clause, pro-

vides in explicit terms that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . .", and said that since no part of this important amendment could be regarded as superfluous, the obvious inference is that in the sense of the Constitution due process of law was not intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case; and that the same phrase, employed in the Fourteenth Amendment to restrain the action of the states, was to be interpreted as having been used in the same sense and with no greater extent; and that if it had been the purpose of that Amendment to perpetuate the institution of the grand jury in the states, it would have embodied, as did the Fifth Amendment, an express declaration to that effect.

The Sixth Amendment, in terms, provides that in all criminal prosecutions the accused shall enjoy the right "to have the assistance of counsel for his defense." In the face of the reasoning of the *Hurtado* case, if it stood alone, it would be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause. But the *Hurtado* case does not stand alone. In the later case of *Chicago, Burlington & Quincy R. Co.* v. *Chicago,* 166 U. S. 226, 241, this court held that a judgment of a state court, even though authorized by statute, by which private property was taken for public use without just compensation, was in violation of the due process of law required by the Fourteenth Amendment, notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation. This holding was followed in *Norwood* v. *Baker,* 172 U. S. 269, 277; *Smyth* v. *Ames,* 169 U. S. 466, 524; and *San Diego Land Co.* v. *National City,* 174 U. S. 739, 754.

Likewise, this court has considered that freedom of speech and of the press are rights protected by the due process clause of the Fourteenth Amendment, although in the First Amendment, Congress is prohibited in specific terms from abridging the right. *Gitlow* v. *New York*, 268 U. S. 652, 666; *Stromberg* v. *California*, 283 U. S. 359, 368; *Near* v. *Minnesota*, 283 U. S. 697, 707.

These later cases establish that notwithstanding the sweeping character of the language in the *Hurtado* case, the rule laid down is not without exceptions. The rule is an aid to construction, and in some instances may be conclusive; but it must yield to more compelling considerations whenever such considerations exist. The fact that the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (*Hebert* v. *Louisiana*, 272 U. S. 312, 316), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the federal Constitution. Evidently this court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. That some such distinction must be observed is foreshadowed in *Twining* v. *New Jersey*, 211 U. S. 78, 99, where Mr. Justice Moody, speaking for the court, said that ". . . it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U. S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in

the conception of due process of law." While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character.

It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns," have been repeated in varying forms of expression in a multitude of decisions. In *Holden* v. *Hardy*, 169 U. S. 366, 389, the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." And Mr. Justice Field, in an earlier case, *Galpin* v. *Page*, 18 Wall. 350, 368–369, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. "Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so.

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right

to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

The decisions all point to that conclusion. In *Cooke* v. *United States,* 267 U. S. 517, 537, it was held that where a contempt was not in open court, due process of law required charges and a reasonable opportunity to defend or explain. The court added, "We think this includes the assistance of counsel, if requested, . . ." In numerous other cases the court, in determining that due process was accorded, has frequently stressed the fact that the defendant had the aid of counsel. See, for example, *Felts* v. *Murphy,* 201 U. S. 123, 129; *Frank* v. *Mangum,* 237 U. S. 309, 344; *Kelley* v. *Oregon,* 273 U. S. 589, 591. In *Ex parte Hidekuni Iwata,* 219 Fed. 610, 611, the federal dis-

trict judge enumerated among the elements necessary to due process of law in a deportation case the opportunity at some stage of the hearing to secure and have the advice and assistance of counsel. In *Ex parte Chin Loy You,* 223 Fed. 833, also a deportation case, the district judge held that under the particular circumstances of the case the prisoner, having seasonably made demand, was entitled to confer with and have the aid of counsel. Pointing to the fact that the right to counsel as secured by the Sixth Amendment relates only to criminal prosecutions, the judge said, " . . . but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner." In *Ex parte Riggins,* 134 Fed. 404, 418, a case involving the due process clause of the Fourteenth Amendment, the court said, by way of illustration, that if the state should deprive a person of the benefit of counsel, it would not be due process of law. Judge Cooley refers to the right of a person accused of crime to have counsel as perhaps his most important privilege, and after discussing the development of the English law upon that subject, says: " With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel." 1 Cooley's Const. Lim., 8th ed., 700. The same author, as appears from a chapter which he added to his edition of Story on the Constitution, regarded the right of the accused to the presence, advice and assistance of counsel as necessarily included in due process of law. 2 Story on the Constitution, 4th ed., § 1949, p. 668. The state decisions which refer to the matter, invariably recognize the right to the aid of counsel as fundamental in character. E. g., *People* v. *Napthaly,* 105 Cal. 641, 644; 39 Pac. 29; *Cutts* v. *State,* 54 Fla. 21, 23; 45 So. 491; *Martin* v. *State,* 51 Ga. 567, 568; *Sheppard* v. *State,* 165 Ga. 460, 464; 141 S. E. 196; *State* v. *Moore,* 61 Kan. 732, 734; 60 Pac. 748;

State v. *Ferris,* 16 La. Ann. 424; *State* v. *Simpson,* 38 La. Ann. 23, 24; *State* v. *Briggs,* 58 W. Va. 291, 292; 52 S. E. 218.

In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, "that there are certain immutable principles of justice which inhere in the very idea of free government which

no member of the Union may disregard." *Holden* v. *Hardy, supra.* In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel. Compare *Carpenter & Sprague* v. *Dane County,* 9 Wis. 274; *Dane County* v. *Smith,* 13 Wis. 585, 586. *Hendryx* v. *State,* 130 Ind. 265, 268–269; 29 N. E. 1131; *Cutts* v. *State,* 54 Fla. 21, 23; 45 So. 491; *People* v. *Goldenson,* 76 Cal. 328, 344; 19 Pac. 161; *Delk* v. *State,* 99 Ga. 667, 669–670; 26 S. E. 752.

In *Hendryx* v. *State, supra,* there was no statute authorizing the assignment of an attorney to defend an indigent person accused of crime, but the court held that such an assignment was necessary to accomplish the ends of public justice, and that the court possessed the inherent power to make it. "Where a prisoner," the court said (p. 269), "without legal knowledge, is confined in jail, absent from his friends, without the aid of legal advice or the means of investigating the charge against him, it is impossible to conceive of a fair trial where he is compelled to conduct his cause in court, without the aid of counsel. . . . Such a trial is not far removed from an *ex parte* proceeding."

Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate and feeble minded, unable to employ counsel, with the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law; and we venture to think that no appellate court, state or federal, would hesitate so to decide. See *Stephenson* v. *State,* 4 Ohio App. 128; *Williams* v. *State,* 163 Ark. 623,

628; 260 S. W. 721; *Grogan* v. *Commonwealth,* 222 Ky. 484, 485; 1 S. W. (2d) 779; *Mullen* v. *State,* 28 Okla. Cr. 218, 230; 230 Pac. 285; *Williams* v. *Commonwealth,* (Ky.), 110 S. W. 339, 340. The duty of the trial court to appoint counsel under such circumstances is clear, as it is clear under circumstances such as are disclosed by the record here; and its power to do so, even in the absence of a statute, can not be questioned. Attorneys are officers of the court, and are bound to render service when required by such an appointment. See Cooley, Const. Lim., *supra,* 700 and note.

The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right.

The judgments must be reversed and the causes remanded for further proceedings not inconsistent with this opinion.

Judgments reversed.

MR. JUSTICE BUTLER, dissenting.

The Court, putting aside—they are utterly without merit—all other claims that the constitutional rights of petitioners were infringed, grounds its opinion and judgment upon a single assertion of fact. It is that petitioners "were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial." If that is true, they were denied due process

of law and are entitled to have the judgments against them reversed.

But no such denial is shown by the record.

Nine defendants including Patterson were accused in one indictment, and he was also separately indicted. Instead of trying them *en masse,* the State gave four trials and so lessened the danger of mistake and injustice that inevitably attends an attempt in a single trial to ascertain the guilt or innocence of many accused. Weems and Norris were tried first. Patterson was tried next on the separate indictment. Then five were tried. These eight were found guilty. The other defendant, Roy Wright, was tried last and not convicted. The convicted defendants took the three cases to the state supreme court where the judgment as to Williams was reversed and those against the seven petitioners were affirmed.

There were three painstaking opinions, a different justice writing for the court in each case. 224 Ala. 524, 531, 540; 141 So. 215, 195, 201. Many of the numerous questions decided were raised at the trial and reflect upon defendants' counsel much credit for zeal and diligence on behalf of their clients. Seven justices heard the cases. The chief justice, alone dissenting, did not find any contention for the accused sufficient in itself to warrant a reversal but alluded to a number of considerations which he deemed sufficient when taken together to warrant the conclusion that the defendants did not have a fair trial. The court said (p. 553): "We think it a bit inaccurate to say Mr. Roddy appeared only as *amicus curiae.* [This refers to a remark in the dissenting opinion.] He expressly announced he was there from the beginning at the instance of friends of the accused; but not being paid counsel asked to appear not as employed counsel, but to aid local counsel appointed by the court, and was permitted so to appear. The defendants were represented as shown by the record and pursuant to appointment of the

court by Hon. Milo Moody, an able member of the local bar of long and successful experience in the trial of criminal as well as civil cases. We do not regard the representation of the accused by counsel as *pro forma.* A very rigorous and rigid cross-examination was made of the state's witnesses, the alleged victims of rape, especially in the cases first tried. A reading of the records discloses why experienced counsel would not travel over all the same ground in each case."

The informality disclosed by the colloquy between court and counsel, which is quoted in the opinion of this Court and so heavily leaned on, is not entitled to any weight. It must be inferred from the record that Mr. Roddy at all times was in touch with the defendants and the people who procured him to act for them. Mr. Moody and others of the local bar also acted for defendants at the time of the first arraignment and, as appears from the part of the record that is quoted in the opinion, thereafter proceeded in the discharge of their duty, including conferences with the defendants. There is not the slightest ground to suppose that Roddy or Moody were by fear or in any manner restrained from full performance of their duties. Indeed, it clearly appears that the State, by proper and adequate show of its purpose and power to preserve order, furnished adequate protection to them and the defendants.

When the first case was called for trial, defendants' attorneys had already prepared, and then submitted, a motion for change of venue together with supporting papers. They were ready to and did at once introduce testimony of witnesses to sustain that demand. They had procured and were ready to offer evidence to show that the defendants Roy Wright and Eugene Williams were under age. The record shows that the State's evidence was ample to warrant a conviction. And three defendants each, while asserting his own innocence, testified that he

saw others accused commit the crime charged. When regard is had to these and other disclosures that may have been and probably were made by petitioners to Roddy and Moody before the trial, it would be difficult to think of anything that counsel erroneously did or omitted for their defense.

If there had been any lack of opportunity for preparation, trial counsel would have applied to the court for postponement. No such application was made. There was no suggestion, at the trial or in the motion for a new trial which they made, that Mr. Roddy or Mr. Moody was denied such opportunity or that they were not in fact fully prepared. The amended motion for new trial, by counsel who succeeded them, contains the first suggestion that defendants were denied counsel or opportunity to prepare for trial. But neither Mr. Roddy nor Mr. Moody has given any support to that claim. Their silence requires a finding that the claim is groundless, for if it had any merit they would be bound to support it. And no one has come to suggest any lack of zeal or good faith on their part.

If correct, the ruling that the failure of the trial court to give petitioners time and opportunity to secure counsel was denial of due process is enough, and with this the opinion should end. But the Court goes on to declare that "the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." This is an extension of federal authority into a field hitherto occupied exclusively by the several States. Nothing before the Court calls for a consideration of the point. It was not suggested below, and petitioners do not ask for its decision here. The Court, without being called upon to consider it, adjudges without a hearing an important constitutional question concerning criminal procedure in state courts.

It is a wise rule, firmly established by a long course of decisions here, that constitutional questions—even when properly raised and argued—are to be decided only when necessary for a determination of the rights of the parties in controversy before it. Thus, in the *Charles River Bridge case,* 11 Pet. 420, the Court said (p. 553): "Many other questions, of the deepest importance, have been raised and elaborately discussed in the argument. It is not necessary, for the decision of this case, to express our opinion upon them; and the Court deem it proper to avoid volunteering an opinion on any question involving the construction of the constitution where the case itself does not bring the question directly before them, and make it their duty to decide upon it." And see *Davidson* v. *New Orleans,* 96 U. S. 97, 103, *et seq. Hauenstein* v. *Lynham,* 100 U. S. 483, 490. *Blair* v. *United States,* 250 U. S. 273, 279. *Adkins* v. *Children's Hospital,* 261 U. S. 525, 544.

The record wholly fails to reveal that petitioners have been deprived of any right guaranteed by the Federal Constitution, and I am of opinion that the judgment should be affirmed.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

UNITED STATES *v.* SHREVEPORT GRAIN & ELEVATOR CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

No. 19. Argued October 19, 1932.—Decided November 7, 1932.

1. Section 2 of the Food and Drugs Act punishes shipment in interstate or foreign commerce of any article of food which is misbranded; and § 8 declares that such an article in package form shall be deemed to be misbranded if the quantity of the contents be not plainly and conspicuously marked on the outside of the package,

in terms of weight, measure, or numerical count; with the proviso "That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with section three." Section three provides that executive officers designated shall make uniform regulations for carrying out the Act. *Held* that the executive regulations are to fix the variations allowable, as well as tolerances and exemptions, hence the statute is not open to the constitutional objection of uncertainty in defining the offense. P. 82.

2. A statute should be construed where possible so as to avoid doubt of its validity. *Id.*
3. In construing a statute, a court will disregard punctuation, or will repunctuate, to show the natural meaning of the words. P. 82.
4. Reports of congressional committees, explaining the bill, may be considered in determining the meaning of a doubtful statute, but will not be used to support a construction contrary to the plain import of its terms. P. 83.
5. Practical and long continued construction of a statute by executive departments charged with its administration and with the duty of making rules and regulations to carry it out, is to be accepted where the statute is doubtful, unless there are cogent and persuasive reasons for rejecting it. P. 84.
6. The provision of the Food and Drugs Act, *supra*, for defining by executive regulations the reasonable variations that are permissible, from the quantities marked on packages, is not an unconstitutional delegation of legislative power. P. 85.

46 F. (2d) 354, reversed.

APPEAL from a judgment quashing an indictment.

Solicitor General Thacher, with whom *Assistant Attorney General St. Lewis*, and *Messrs. Erwin N. Griswold* and *W. Clifton Stone* were on the brief, for the United States.

Mr. Yandell Boatner, with whom *Mr. Judson M. Grimmet* was on the brief, for appellee.

The statute does not validly define a criminal offense, and by reason of its uncertainty is invalid under the Fifth and Sixth Amendments. *Levy Leasing Co.* v. *Siegel*, 258 U. S. 241; *United States* v. *Cohen Grocery Co.*, 255 U. S.

81; *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Brewer*, 139 U. S. 278; *Todd* v. *United States*, 154 U. S. 282; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Connally* v. *General Construction Co.*, 269 U. S. 385; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592; *Champlin Refining Co.* v. *Corporation Commn.*, 286 U. S. 210. Cf. also, *Smith* v. *Cahoon*, 283 U. S. 553; *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500.

The cited cases establish that in criminal statutes it is necessary that the legislature draw a line clearly distinguishing between what is permissible and what is forbidden.

The infirmity of the Act is not cured by departmental regulations. *United States* v. *United Verde Copper Co.*, 196 U. S. 205; *Morrill* v. *Jones*, 106 U. S. 466; *United States* v. *Eaton*, 144 U. S. 677; *Williamson* v. *United States*, 207 U. S. 426; *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1.

These cases disclose that it is within the power of Congress to vest in executive officers the power to make necessary rules and regulations to enforce the provisions of the law, but that Congress can not delegate its power to make laws to an executive department or to an administrative officer, nor confer upon any such officer or the courts the power to determine what the rule of law shall be. In fine, Congress must prescribe the rule; details of execution may be established by regulation. In no event can the regulations alter, amend, or go beyond the provisions of the Act. Who is to decide in any given case whether the regulations exceed proper bounds? If the Secretaries have determined upon variations which they consider reasonable, are such determinations conclusive? Who is to say whether the regulations are not themselves unreasonable? In the instant case, a trial by jury must be had and the question decided by the jury. The jury

must determine as a matter of fact whether the variations of weight in the packages shipped are reasonable under the circumstances. The report of the House Committee on Interstate and Foreign Commerce is in agreement with these views.

The ultimate determination as to the reasonableness of the variations in a given case is for the court. Tolerances established by the regulations are advisory merely, and are in the nature of directions to the executive officers as regards the standards to be observed by them in initiating prosecutions under the Act.

The Act also is in conflict with Articles I, II, and III of the Constitution, separating the Government into legislative, executive, and judicial divisions, if its provisions in § 3 authorizing the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce to make regulations are to be given the scope and effect now contended for by the Government.

Mr. Justice Sutherland delivered the opinion of the Court.

The defendant (appellee) was charged by indictment, returned in the court below, with misbranding certain sacks, containing corn meal, an article of food, by labeling each of the sacks as containing a greater quantity by weight than in fact was contained therein, contrary to the provisions of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768, U. S. C., Title 21, § 2, which make it unlawful to ship in interstate or foreign commerce any article of food or drugs which is adulterated or misbranded, within the meaning of the act. The penalty prescribed is a fine of $200 for the first offense, and for each subsequent offense, not exceeding $300, or imprisonment not exceeding one year, or both, in the discretion of the court. Section 8, as amended by the act

of March 3, 1913, c. 117, 37 Stat. 732, provides that an article of food shall be deemed to be misbranded—

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act."

A motion to quash the indictment was interposed by the defendant upon the grounds that the act of Congress relied on is unconstitutional, because (1) the offense is not defined with certainty and therefore the act violates the due process clause of the Fifth Amendment, and the requirement of the Sixth Amendment that the accused shall enjoy the right "to be informed of the nature and cause of the accusation"; and (2) it is in conflict with Articles I, II, and III of the federal Constitution which separate the government into legislative, executive and judicial branches.

The court below sustained the motion and dismissed the proceedings. The case comes here by appeal under the provisions of § 238 of the Judicial Code, as amended by the Act of February 13, 1925. U. S. C., Title 28, § 345; U. S. C., Title 18, § 682.

First. The contention seems to be that the proviso makes it necessary to read § 8 as substantively prohibiting unreasonable variations in the weight, measure or numerical count of the quantity and contents of any package from that marked on the outside of the package; and that the test thereby indicated is so indefinite and uncertain that it fails to fix any ascertainable standard of guilt, or afford a valid definition of a crime. In support of the contention *United States* v. *Cohen Grocery Co.,* 255 U. S.

81, *United States* v. *Brewer,* 139 U. S. 278, *Connally* v. *General Construction Co.,* 269 U. S. 385, and other decisions of this Court are relied upon.

We are of opinion that the construction thus sought to be put upon the act cannot be sustained; and, therefore, other considerations aside, the cases cited do not apply. The substantive requirement is that the quantity of the contents shall be plainly and conspicuously marked in terms of weight, etc. We construe the proviso simply as giving administrative authority to the Secretaries of the Treasury, Agriculture, Commerce and Labor to make rules and regulations permitting reasonable variations from the hard and fast rule of the act and establishing tolerances and exemptions as to small packages, in accordance with § 3 thereof.* This construction avoids the doubt which otherwise might arise as to the constitutional point, and, therefore, is to be adopted if reasonably possible. *United States* v. *Standard Brewery,* 251 U. S. 210, 220; *United States* v. *La Franca,* 282 U. S. 568, 574. We find nothing in the terms of the act to require a division of the proviso so that the power of regulation will apply to the establishment of tolerances and exemptions, but not to reasonable variations. We think both are included. As to this there would be no room for doubt if it were not for the presence of a comma after the word "permitted," or the absence of one after the word "established." Inserting the latter, the proviso would read, "That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established, by rules and regulations . . ." Punctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctua-

* Sec. 3 provides that the Secretaries named "shall make uniform rules and regulations for carrying out the provisions of this act. . . . ."

tion, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed. *Hammock* v. *Loan & Trust Co.,* 105 U. S. 77, 84–85; *United States* v. *Lacher,* 134 U. S. 624, 628; *United States* v. *Oregon & California R. Co.,* 164 U. S. 526, 541; *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 480; *Chicago, M. & St. P. Ry. Co.* v. *Voelker,* 129 Fed. 522, 526–527.

Our attention is called to the fact that the House Committee on Interstate and Foreign Commerce, in reporting the bill which afterwards became the act in question (H. R. 850, 62d Cong., 2d Sess., pp. 2–4), agreed with the view that the authority to make rules and regulations was confined to the establishment of tolerances and exemptions; and that the Senate Committee on Manufactures (S. R. 1216, 62d Cong., 3d Sess., pp. 2–4) reported to the same effect. In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. *Wisconsin R. R. Commn.* v. *C., B. & Q. R. Co.,* 257 U. S. 563, 588–589; *Penna. R. Co.* v. *International Coal Co.,* 230 U. S. 184, 199; *Van Camp & Sons* v. *American Can Co.,* 278 U. S. 245, 253. Like other extrinsic aids to construction their use is "to *solve,* but not to *create* an ambiguity." *Hamilton* v. *Rathbone,* 175 U. S. 414, 421. Or, as stated in *United States* v. *Hartwell,* 6 Wall. 385, 396, "If the language be clear it is conclusive. There can be no construction where there is nothing to construe." The same rule is recognized by the English courts. In *King* v. *Commissioners,* 5 A. & E. 804, 816, Lord Denman, applying the rule, said that the court was constrained to give the words of a private act then under consideration an effect which probably was "never contemplated by those who

obtained the act, and very probably not intended by the legislature which enacted it. But our duty is to look to the language employed, and construe it in its natural and obvious sense." See also *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 409; *Caminetti* v. *United States*, 242 U. S. 470, 485.

Moreover, the practical and long continued construction of the executive departments charged with the administration of the act and with the duty of making the rules and regulations therein provided for, has been in accordance with the view we have expressed as to the meaning of the section under consideration. The rules and regulations, as amended on May 11, 1914, deal with the entire subject in detail under the recital, "(i) The following tolerances *and variations* [italics supplied] from the quantity of the contents marked on the package shall be allowed: . . ." Then follows an enumeration of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice; due to differences in capacity of bottles and similar containers, resulting from unavoidable difficulties in manufacture, etc.; or in weight due to atmospheric differences in various places, etc. These regulations, which cover variations as well as tolerances and exemptions, have been in force for a period of more than eighteen years, with the silent acquiescence of Congress. If the meaning of the statutory words was doubtful, so as to call for a resort to extrinsic aid in an effort to reach a proper construction of them, we should hesitate to accept the committee reports in preference to this contemporaneous and long continued practical construction of the act on the part of those charged with its administration. Such a construction, in cases of doubtful meaning, is accepted unless there are cogent and persuasive reasons for rejecting it. See, for example, *United States* v. *Johnston*, 124 U. S. 236, 253.

Second. The contention that the act contravenes the provisions of the Constitution with respect to the separation of the governmental powers is without merit. That the legislative power of Congress cannot be delegated is, of course, clear. But Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the " power to fill up the details " by prescribing administrative rules and regulations. That the authority conferred by the act now under review in this respect does not transcend the power of Congress is not open to reasonable dispute. The effect of the provision assailed is to define an offense, but with directions to those charged with the administration of the act to make supplementary rules and regulations allowing reasonable variations, tolerances and exemptions, which, because of their variety and need of detailed statement, it was impracticable for Congress to prescribe. The effect of the proviso is evident and legitimate, namely, to prevent the embarrassment and hardship which might result from a too literal and minute enforcement of the act, without at the same time offending against its purposes. The proviso does not delegate legislative power but confers administrative functions entirely valid within principles established by numerous decisions of this court, of which the following may be cited as examples. *Buttfield* v. *Stranahan,* 192 U. S. 470, 496; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 542; *United States* v. *Grimaud,* 220 U. S. 506, and authorities reviewed.

Judgment reversed.

Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo concur in the result on the ground that the statute, as punctuated, reads as its legislative history shows Congress intended it to read, and that, so read, it is sufficiently definite to satisfy constitutional requirements.

SEABOARD AIR LINE RAILWAY CO. *v.* WATSON.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 4. Argued October 14, 1932.—Decided November 7, 1932.

1. A Florida statute provides that railroad companies shall be liable for damages done to persons or property by the running of their locomotives, unless they make it appear that their agents exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company. *Held:*

   (1) The fact that a like rule is not applied against carriers by motor and other litigants does not render the statute unduly discriminatory against railroads in violation of the equal protection clause of the Fourteenth Amendment. P. 90.

   (2) The objection that it violates the due process clause of the Amendment, cf. *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, was not properly presented in this case. P. 91.

2. The court may, and generally will, disregard a specification that is so uncertain or otherwise deficient as not substantially to comply with the rule respecting assignments of errors, even if the opposing party raises no question as to the sufficiency of the specification and treats it as adequate. *Id.*

3. An appeal from a state court on which no federal question is presented, will be dismissed. P. 92.

103 Fla. 477; 137 So. 719, appeal dismissed.

APPEAL from a judgment sustaining in part a recovery from the railroad company for damages suffered by the plaintiff in a grade-crossing accident.

Mr. W. J. Oven for appellant.

Mr. John E. Mathews for appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellant seeks reversal of a judgment obtained by appellee upon the ground that § 7051 of the Compiled General Laws, 1927, as construed below is repugnant to the due process and equal protection clauses of the Fourteenth Amendment. § 237, Judicial Code, 28 U. S. C.,

§ 344. Section 7051 declares: "A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

Watson sued the railway company to recover damages caused by a collision, at a highway grade crossing, between one of defendant's locomotives and plaintiff's mule team being driven by his employee. The declaration alleged that the collision was caused by the negligence of defendant in that it operated the train at excessive speed and failed by whistle or otherwise to give warning. Defendant pleaded not guilty and that the negligence of the driver was the sole cause of the accident. Plaintiff introduced evidence showing the collision and resulting damage. Defendant called witnesses whose testimony tended to show that its employees were not negligent and that the driver's negligence was the sole cause of the accident. Plaintiff produced witnesses in rebuttal who gave evidence to show that the accident resulted from the negligent failure of defendant to give proper warning.

In the course of its charge the court instructed the jury: (1) The plea of not guilty imposes on plaintiff the burden of proving that the damage was caused by alleged negligence of defendant; (2) "Our statute provides that a railroad company shall be liable for any damage done to stock or property of another by the running of locomotives or cars unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence,—the presumption in all cases being against the company"; (3) If defendant's employees and plaintiff's teamster were at fault the plaintiff may recover the

amount of his damages reduced in proportion to the contributory negligence of his servant; (4) If the evidence establishes that the damage alleged was caused by the running of the locomotive, plaintiff may recover "unless the defendant company shall make it appear by a preponderance of the evidence that its employees exercised all ordinary and reasonable care and diligence in the premises"; (5) The defendant submitted a request to charge which was by the court "slightly modified" and given as follows: "The presumption of negligence cast upon railroads by our statute in personal injury cases ceases when the railroad company has made it appear by a preponderance of the evidence that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company the jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The statute does not create such a presumption as will outweigh proofs, or that will require any greater or stronger or more convincing proofs to remove it." Defendant submitted two requests for instructions in respect of negligence on the part of the teamster but the court refused to give them.

The jury gave plaintiff a verdict for the amount of his damages and the trial court entered judgment thereon. The supreme court sustained the finding of negligence on the part of the defendant, but held that the evidence established contributory negligence and ordered that unless plaintiff enter a remittitur for a specified sum the judgment should be reversed and a new trial granted. The plaintiff made the reduction and judgment was entered for the remainder.

The Florida statute in question is the same as that of Georgia condemned by this court as so unreasonable and arbitrary as to be repugnant to the due process clause of the Fourteenth Amendment. It was not necessary to

consider, and we did not decide, whether the statute also violated the equal protection clause. *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, reversing 167 Ga. 22.

Appellant failed in the trial court to assail the statute on any ground upon which rests our decision in the *Henderson* case. In its motion for a new trial and in the assignment of errors submitted with its proposed bill of exceptions, it asserted as to each of the instructions numbered (2), (3) and (4) that the court erred in so charging "because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States." And it made the same objection to another charge which, so far as concerns questions before us, is not to be distinguished from instruction (4). Appellant has not included in the record its request which was by the court modified and given. It does not appear how the instruction differed from the request and, as appellant has not complained of the modification or of the charge as given, the instruction is to be considered as not differing materially from the request and to have been acquiesced in and accepted by appellant. The record on which the case was taken to the state supreme court discloses no contention on the part of appellant that as construed at the trial the statute is unreasonable or arbitrary or that it operated as a denial of due process of law. But the opinion of that court states—whether inadvertently we need not consider—that some assignments of error question the constitutionality of the section as denying the defendant "due process of law' and the equal protection of the laws. After reference to our decision in the *Henderson* case and to *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, the court said: "All that the statute does in this state in creating a presumption is thereby to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reason-

able care and diligence, and here the statutory presumption ends," held that the trial court "properly instructed the jury in regard to the presumption in this case" and overruled appellant's contention that the statute is unconstitutional because it does not apply to buses as well as to railroads.

The errors assigned and urged here amount to no more than that as construed the section operated to deny appellant equal protection because it required appellant to carry throughout the trial a burden not put upon motor carriers for hire or other litigants, and that the refusal of the trial court to give to the jury the requested instructions in respect of negligence on the part of the teamster deprived appellant of the equal protection of the laws.

In view of numerous decisions of this court sustaining legislative classifications for various purposes and declaring the principles upon which their constitutional validity depends, it does not require any discussion to show that the mere discrimination resulting from the application of the presumption created by § 7051 to appellant and other railroad companies and the failure of the State to prescribe the same or a like rule in similar actions against carriers by motor for hire or other litigants does not violate the equal protection clause of the Fourteenth Amendment. Appellant's contention to the contrary is without substance. *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512, 522. *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205, 209. *Chicago, K. & W. R. Co.* v. *Pontius*, 157 U. S. 209, 210. *St. Louis & San Francisco Ry. Co.* v. *Mathews*, 165 U. S. 1, 24 *et seq.* *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 157 *et seq.* *Atchison, Topeka & Santa Fe Ry. Co.* v. *Matthews*, 174 U. S. 96. *Mobile, J. & K. C. R. R.* v. *Turnipseed*, *supra*, 41–42. *Truax* v. *Corrigan*, 257 U. S. 312, 337.

The assignments of error accompanying this appeal contain a single reference to due process. It is in a speci-

fication which merely asserts that the state supreme court "erred in holding that the scope and effect of Section 7051 . . . did not in the trial of this case in the Court below deprive the . . . Railway Company . . . of its property without due process of law and of the equal protection of the law as guaranteed to it" by § 1 of the Fourteenth Amendment.

It is essential to a proper presentation of points relied on for reversal that the statute and rules of court requiring and governing the forms of assignments of errors be complied with. Every appeal must be accompanied by an assignment of errors which shall "set out separately and particularly each error asserted." R. S., § 997, 28 U. S. C., § 862. Rule 9. The purpose is to enable the court as well as opposing counsel, readily to perceive what points are relied on. The substitution of vague and general statement for the prescribed particularity sets the rule at naught. *Phillips & Colby Construction Co.* v. *Seymour,* 91 U. S. 646, 648. *Briscoe* v. *District of Columbia,* 221 U. S. 547, 549–550. And as the rule makes for convenience and certainty in the consideration of cases the court may, and generally it will, disregard a specification that is so uncertain or otherwise deficient as not substantially to comply with the rule, even if the opposing party raises no question and treats it as adequate. The quoted assignment amounts merely to a complaint that the supreme court erred in not reversing the judgment of the trial court because "in the trial of this case" the "scope and effect" of the section deprived appellant of its property in violation of both the due process and equal protection clauses. An allegation of error could scarcely be more indefinite. It does not identify any ruling at the trial or specify any basis for the assertion of deprivation of constitutional right. It presents no question for our consideration.

The assignments of error based upon the court's failure to instruct the jury concerning contributory negligence of plaintiff's teamster in accordance with defendant's requests present no question for decision here. The record discloses no foundation for the claim that the refusal so to charge was, as appellant asserts, "because of the statute." It does not appear that the trial court regarded the statute as having any relation to the precaution or care required of plaintiff's driver when approaching the crossing. The claim that such refusals transgressed the constitutional rule of equality is utterly without foundation.

No substantial constitutional question being presented, the appeal will be dismissed. *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29. *Erie R.* v. *Solomon,* 237 U. S. 427, 431. *Sugarman* v. *United States,* 249 U. S. 182. *Zucht* v. *King,* 260 U. S. 174. *Roe* v. *Kansas,* 278 U. S. 191.

Dismissed.

MR. JUSTICE BRANDEIS took no part in the consideration or decision of this case.

SCHOENTHAL ET AL. *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 14. Argued October 18, 1932.—Decided November 7, 1932.

1. Section 267 of the Judicial Code, providing that "suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law," is declaratory of the rule followed by courts of equity and should be liberally construed as serving to guard the right of trial by jury preserved by the Seventh Amendment. P. 94.
2. The question whether a case should be tried at law or in equity depends upon the facts stated in the bill. P. 95.

3. A suit by a trustee in bankruptcy to recover preferential payments of ascertained and definite amounts and in which the complaint avers no facts that call for an accounting or other equitable relief, should be tried at law. *Id.*
4. Defendants who answered a bill putting all its allegations in issue including the allegation that plaintiff had no adequate remedy at law, and who, after the case was advanced on the equity calendar but before it was reached for trial, made their motion for a transfer under the 22d Equity Rule, *held* not to have waived their right to such transfer. Pp. 96–97.

54 F. (2d) 1079, reversed.

CERTIORARI, 285 U. S. 536, to review the affirmance of a decree in a suit by a trustee in bankruptcy to recover the amount of payments made by a bankrupt which the bill challenged as preferences.

Mr. Leo Guzik, with whom *Mr. Horace London* was on the brief, for petitioners.

Mr. George C. Levin for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit in equity brought by respondent in the district court for southern New York to recover from Morris Schoenthal $500 and from Fannie Schoenthal $1,000 paid them by the bankrupt. The bill alleged facts sufficient to show that each of these payments operated as a preference under § 60b of the Bankruptcy Act, 11 U. S. C., § 96b, asserted that plaintiff had no adequate remedy at law, and prayed decree declaring the payments preferential and directing defendants to account for and pay to plaintiff the amounts so received with interest and costs. October 27, 1930, defendants separately answered and put in issue all the allegations of the bill.

The case was advanced to the February, 1931, calendar. February 13, invoking Equity Rule 22, defendants, on petition and notice of motion to be heard four days

later, applied for an order transferring the suit to the law side of the court and for a trial by jury. On the return day the application was referred to the judge sitting in equity and was taken up February 24. After hearing counsel, the court denied the motion and immediately proceeded to trial in equity. It heard evidence, filed findings of fact and conclusions of law and entered judgment that plaintiff recover from Morris Schoenthal $538.74 and from Fannie Schoenthal $1,075.84 and have executions therefor. The Circuit Court of Appeals affirmed.

The principal question is whether, assuming they made timely application under Rule 22, defendants were entitled to have the suit tried at law.

Section 267 of the Judicial Code provides: "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law." 28 U. S. C., § 384. That rule has always been followed in courts of equity. The enactment gives it emphasis and indicates legislative purpose that it shall not be relaxed. *New York Guaranty Co.* v. *Memphis Water Co.*, 107 U. S. 205, 214. *Matthews* v. *Rodgers*, 284 U. S. 521, 525. It serves to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed. Cf. *Ex parte Yerger*, 8 Wall. 85, 101–103. In England, long prior to the enactment of our first Judiciary Act, common law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts.[1] Suits to recover preferences constitute no

[1] *Meggott* v. *Mills*, 1 Ld. Raym. 286. *Atkin* v. *Barwick*, 1 Stra. 165. *Alderson* v. *Temple*, Burr. 2235. *Harman* v. *Fishar*, Cowp. 117. *Rust* v. *Cooper*, Cowp. 629. *Thompson* v. *Freeman*, 1 D. & E. 155. *Barnes* v. *Freeland*, 6 D. & E. 80. *Smith* v. *Payne*, 6 D. & E. 152. *Nixon* v. *Jenkins*, 2 H. Bl. 135. *Marks* v. *Feldman*, L. R. 5 Q. B. 275, 280–281. Cf. *Ex parte Scudamore*, 3 Ves. 85, 87. *Farrow* v. *Mayes*, 18 Q. B. 516.

part of the proceedings in bankruptcy but concern controversies arising out of it. *Taylor* v. *Voss,* 271 U. S. 176, 182. They may be brought in the state courts as well as in the bankruptcy courts. *Collett* v. *Adams,* 249 U. S. 545, 549. The question whether remedy must be by action at law or may be pursued in equity notwithstanding objection by defendant depends upon the facts stated in the bill. And, in absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained. *Boyce's Executors* v. *Grundy,* 3 Pet. 210, 215. *Buzard* v. *Houston,* 119 U. S. 347, 352. *United States* v. *Bitter Root Co.,* 200 U. S. 451, 472. The facts here alleged give no support to plaintiff's assertion that it has no adequate remedy at law. The preferences sued for were money payments of ascertained and definite amounts. The bill discloses no facts that call for an accounting or other equitable relief. It is clear that there may be had at law "a remedy as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity." *Boyce's Executors* v. *Grundy, ubi supra.* The contention that § 267 prohibits the maintenance of this suit in equity is sustained in principle by numerous decisions of this court.[2] And upon the very question here presented the weight of judicial opinion in the lower federal courts[3] and in the state courts[4] is that suits such as this cannot be sustained in equity.

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[2] *Hipp* v. *Babin,* 19 How. 271, 279. *Parker* v. *Winnipiseogee Lake Co.,* 2 Black 545, 550 *et seq.* *Kennedy* v. *Gibson,* 8 Wall. 498, 505. *Insurance Co.* v. *Bailey,* 13 Wall. 616, 620–621. *Grand Chute* v. *Winegar,* 15 Wall. 373, 376. *Lewis* v. *Cocks,* 23 Wall. 466, 469. *New York Guaranty Co.* v. *Memphis Water Co.,* 107 U. S. 205, 214. *Buzard* v. *Houston,* 119 U. S. 347, 352–353. *Whitehead* v. *Shattuck,* 138 U. S. 146, 150–151. *United States* v. *Bitter Root Co.,* 200 U. S. 451, 472.

[3] *Warmath* v. *O'Daniel* (C. C. A.–6, 1908) 159 Fed. 87, 90. *Sessler* v. *Nemcof* (E. D. Pa., 1910) 183 Fed. 656. *Grant* v. *National Bank*

Plaintiff insists that defendants waived their right to have the sui transferred to the law side.

Rule 22 declares: "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential." As plaintiff's bill shows that it had a plain, adequate and complete remedy at law, defendants were entitled upon proper application to have the suit transferred and trial by jury. Undoubtedly they might have waived that right. *Reynes* v. *Dumont,* 130 U. S. 354, 395. *American Mills Co.* v. *American Surety Co.,* 260 U. S. 360, 363. But the record discloses no act or omission of theirs at all inconsistent with their denial by answer of the assertion in the bill that plaintiff had no remedy at law or to suggest that they were willing that the case should be

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of Auburn (N. D. N. Y., 1912) 197 Fed. 581, 590. *First State Bank* v. *Spencer* (C. C. A.–8, 1915) 219 Fed. 503. *Simpson* v. *Western Hardware & Metal Co.* (W. D. Wash., 1915) 227 Fed. 304, 313. *Edwards Co.* v. *La Dow* (C. C. A.–6, 1916) 230 Fed. 378, 381. *Turner* v. *Schaeffer* (C. C. A.–6, 1918) 249 Fed. 654. *Rosenthal* v. *Heller* (M. D. Pa., 1920) 266 Fed. 563. *Morris* v. *Neumann* (C. C. A.–8, 1923) 293 Fed. 974, 978. *Adams* v. *Jones* (C. C. A.–5, 1926) 11 F. (2d) 759, certiorari denied, 271 U. S. 685. *Lewinson* v. *Hobart Trust Co.* (N. J., 1931) 49 F. (2d) 356. *Gelinas* v. *Buffum* (C. C. A.–9, 1931) 52 F. (2d) 598.

Contra: *Pond* v. *New York National Exch. Bank* (S. D. N. Y., 1903) 124 Fed. 992. *Off* v. *Hakes* (C. C. A.–7, 1905) 142 Fed. 364, 366. *In re Plant* (S. D. Ga., 1906) 148 Fed. 37. *Parker* v. *Black* (C. C. A.–2, 1907) 151 Fed. 18. *Parker* v. *Sherman* (C. C. A.–2, 1914) 212 Fed. 917, 918. *Reed* v. *Guaranty Security Corp.* (Mass., 1925) 291 Fed. 580.

[4] *McCormick* v. *Page* (1901) 96 Ill. App. 447. *Detroit Trust Co.* v. *Old National Bank* (1908) 155 Mich. 61, 64; 118 N. W. 729. *Boonville National Bank* v. *Blakey* (1906) 166 Ind. 427, 442; 76 N. E. 529. *Irons* v. *Bias* (1920) 85 W. Va. 493; 102 S. E. 126. *People's Bank* v. *McAleer* (1920) 204 Ala. 101, 103; 85 So. 413.

tried in equity. Their application was noticed to be heard about a week before the case was reached for trial. It is not shown that they delayed the hearing of the motion. Presumably the matter was referred to the judge sitting in equity to serve the convenience of the court. The rule directs the transfer if "at any time" it shall appear that the suit should have been brought as an action at law. An application for transfer brought on for hearing before the commencement of the trial is not too late. *Parkerson* v. *Borst,* 251 Fed. 242, 245. Plaintiff's claim that defendants waived their right under the rule is without merit.

Reversed.

WASHINGTON FIDELITY NATIONAL INSURANCE CO. *v.* BURTON.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 22. Argued October 20, 1932.—Decided November 7, 1932.

Section 657 of the Code of the District of Columbia, as amended, provides that each life insurance company doing business in the District shall deliver with each policy issued by it a copy of the application made by the insured, so that the whole contract may appear in the said application and policy, "in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application." *Held:* That where the policy declared that it constituted the entire agreement, the fact that no application was delivered with it did not preclude a defense based upon a provision of the policy avoiding it if the insured was not in sound health at the time of issue. P. 100.
56 F. (2d) 300, reversed.

CERTIORARI, 286 U. S. 536, to review the affirmance of a judgment in an action on a life insurance policy.

Mr. Gilbert L. Hall, with whom *Messrs. Walter C. Clephane* and *J. Wilmer Latimer* were on the brief, for petitioner.

Mr. W. Gwynn Gardiner, with whom *Mr. George A. Maddox* was on the brief, for respondent.

Messrs. Benjamin S. Minor, H. Prescott Gatley, and *Arthur P. Drury,* by leave of Court, filed a brief as *amici curiae.*

Mr. Justice Butler delivered the opinion of the Court.

Respondent sued in the municipal court of the District of Columbia to recover the amount of an insurance policy issued by petitioner December 12, 1927, on the life of her husband, who died May 22, 1929. The policy was delivered to the insured and all premiums were paid in the District of Columbia where he lived. Adequate proof of death, plaintiff's demand for payment and defendant's refusal to pay were conceded. The policy contained these provisions: "This Policy constitutes the entire agreement between the Company and the Insured and the holder and owner hereof. . . . If the Insured . . . is not in sound health on the date hereof . . . the Company may declare this Policy void . . ." Section 657 of the District Code (Act of March 3, 1901, 31 Stat. 1294, as amended by Act of June 30, 1902, 32 Stat. 534) provides: "Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application." The company did not deliver with the policy or otherwise a copy of an application therefor. Indeed, there was no evidence that any had been made. Defendant offered evidence to show that, at the date of the issue of the policy, the insured was not in sound health. Plaintiff objected on the ground that no copy of the application

was delivered with the policy. The court, relying on the statute, sustained the objection and refused to permit defendant to interpose that defense and gave judgment for plaintiff. The Court of Appeals affirmed. 56 F. (2d) 300.

The sole question is whether § 657 was rightly construed.

The Court of Appeals assumed as a matter of common knowledge that life insurance polices are issued on written applications and that in this case one had been made by the insured. Without deciding whether that assumption is warranted, we shall consider the case as if it were shown that the assured applied in writing for the insurance in question. In the absence of a statute forbidding it, contracts of insurance may be made orally. *Relief Fire Ins. Co.* v. *Shaw,* 94 U. S. 574. There is no such prohibition in the District of Columbia. In § 657 the word "policy" and the phrase "a copy of the application" plainly indicate that writings are meant (*Trustees of the First Baptist Church* v. *Brooklyn Fire Ins. Co.,* 19 N. Y. 305, 308), and that the statute does not extend to oral applications. The construction generally put upon enactments like the one before us indicates that the principal if not the only purpose is that, if there be an application, a copy of it shall be attached to or otherwise delivered with the policy so that the documents showing the entire agreement shall be made available to the insured.* That serves to guard the insured against misunderstanding as to his contract and, in case of controversy with the company, to protect him against sur-

MacKinnon & Co. v. *Mut. Fire Ins. Co.,* 89 Ia. 170; 56 N. W. 423. *Rauen* v. *Insurance Co.,* 129 Ia. 725; 106 N. W. 198. *Kirkpatrick* v. *Accident Co.,* 139 Ia. 370; 115 N. W. 1107. *Lenox* v. *Insurance Co.,* 165 Pa. 575; 30 Atl. 940. *Washington Fire Relief Assn.* v. *Albro,* 130 Wash. 114; 226 Pac. 264. *Metropolitan L. Ins. Co.* v. *Scott,* 160 Miss. 537; 134 So. 159.

prise, inconvenience and danger of injustice liable to arise where the policy does not contain the entire agreement and refers for parts of it to applications or other papers. That purpose is reflected clearly by the clause that, in default of the required delivery of a copy of the application, no defense shall be allowed to such policy on account of anything "contained in, or omitted from, such application." And the barring of such defenses is the only consequence declared to result.

Here the policy definitely declares that it constitutes the entire agreement between the parties. The defense interposed is based solely on one of its provisions and has no relation to the application. The section does not require written applications to be made or declare that, where one is made but not delivered with the policy, there shall be no defense based on the provisions of the policy itself. And no reason is suggested in support of a construction of the section that would prevent defense based on a provision of the policy even though a similar or the same provision were contained in an application. As this policy expressed the entire agreement defendant, notwithstanding its failure to deliver a copy of the application, was entitled to interpose such defenses as would have been open to it if no application had been made. *MacKinnon & Co.* v. *Mut. Fire Ins. Co.*, 89 Ia. 170, 173; 56 N. W. 423. *Imperial F. Ins. Co.* v. *Dunham*, 117 Pa. 460, 473; 12 Atl. 668. It follows that § 657 furnishes no support for the refusal of the trial court to permit defendant to show that the insured was not in sound health when the policy was issued.

Judgment reversed.

MR. JUSTICE STONE, dissenting.

If an insurance policy is issued on written application and the company fails to deliver a copy of it to the in-

sured, along with the policy, the District statute, in terms, provides that "no defense shall be allowed to such policy on account of anything contained in or omitted from the application." In this case it does not appear that there was any written application, and as the defense was based on a clause contained in the policy, which purported to embody the "whole contract," no case was presented calling for the application of the statute, or which would enable a court to say just what force should be given to its prohibition in a case where the written application, not delivered with the policy, is in evidence. For that reason the case should be reversed if it is not, for other reasons, to be dismissed.

I think it should be dismissed. The certiorari was granted upon a petition which set forth as grounds for its allowance that the court below, in construing the prohibition of the statute, had "decided erroneously a question of general importance" and that the decision "is in conflict with all decisions in other jurisdictions involving similar statutes and therefore tends to unsettle the law." Upon the briefs and the argument the statutes of many states were quoted, prescribing the legal consequences of the failure of the insurer to deliver to the insured, with the policy, a copy of the written application. Most of them provide only that in such cases the application is not to be considered a part of the policy or received in evidence in a suit brought upon it. None contain language like that of the present statute prohibiting any defense on the policy "on account of anything contained in or omitted from" the application, and we have been cited to no decision of any court outside the District of Columbia in which that language or any resembling it has been considered.

It thus appears that the construction of the statute which we were asked to review is not in the case, and even if it were, it is of local significance only. The conflict of

decisions asserted is not shown. Plainly the question is not of such general interest or importance as under the rules and practice of this Court warrants its review upon certiorari. For these reasons it is the duty of this Court to dismiss the writ as improvidently granted. *Tyrrell* v. *District of Columbia,* 243 U. S. 1; *Southern Power Co.* v. *Public Service Co.,* 263 U. S. 508; *Houston Oil Co.* v. *Goodrich,* 245 U. S. 440; *Layne & Bowler Corp.* v. *Western Well Works,* 261 U. S. 387; *Furness, Withy & Co.* v. *Yang-Tsze Insurance Assn.,* 242 U. S. 430.

If the writ is not to be dismissed and the case is to be decided on the construction of the statute, the Court's reversal of the judgment, in the absence of the application which, for purposes of decision, it assumes to exist, can only proceed on the ground that under no circumstances could a defense based on a clause in the policy itself be said to be one "on account of anything contained in or omitted from the application." With that conclusion I am unable to agree. The defense here was that the insured was not in sound health at the date of the policy. Petitioner sought to establish it by showing that the state of health of the insured, then deceased, had been bad for several years before the policy was issued. If the written application were before the Court and revealed that the insured had been asked about his condition of health and had either answered fully and truthfully, or not at all, it would show, I think, that the defense, within the very meaning and purpose of the statute, was "on account" of something "contained in or omitted from the application," and that the petitioner was precluded from making it.

MR. JUSTICE BRANDEIS concurs in this opinion.

Syllabus.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* HARMEL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 26. Argued October 20, 21, 1932.—Decided November 7, 1932.

1. The income received by the lessor from an oil and gas lease, whether by way of an initial bonus or as royalties on the oil and gas subsequently produced by the lessee, was taxable, under the Revenue Act of 1924, not as gain from the "sale" of capital assets, but as ordinary income. Pp. 105, 112.
2. In prescribing a lower rate upon gain derived from sale of capital assets than upon income generally, the object of the statute was to relieve taxpayers from hardships resulting when long-time increases of capital value are taxed in the year of their realization at high surtax rates, and to remove the deterrent effect of those hardships on conversions of capital investments. P. 106.
3. Taxation of the lessor's receipts from an oil and gas lease, as income, does not ordinarily result in this hardship, aimed at by the statute; nor would such a lease be generally described as a "sale" of the mineral content of the soil, using the term either in its technical sense or as commonly understood. Pp. 106–107.
4. The statute should be construed in the light of earlier rulings of this Court classing payments under mining leases as income, like payments of rent. P. 108.
5. Although by the law of the State where the land is situate the execution of an oil and gas lease is deemed to pass immediately to the lessee the title to the oil and gas, in place, the bonus payments are not therefore to be regarded as receipts from a sale of capital assets within the meaning of the Revenue Act, *supra*. *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, distinguished. P. 109.
6. A federal income tax act is an exercise of a plenary power of Congress and is to be given a uniform construction of nation-wide application except in so far as Congress, expressly or by necessary implication, makes its operation dependent on state law. P. 110.
7. Section 208 of the Revenue Act of 1924 neither says nor implies that the determination of "gain from the sale or exchange of capital assets" is to be controlled by state law. In determining the applicability of the section to payments received under an oil and gas lease, the economic consequences of the leases are to be

considered rather than any particular characterization of the payments in the local law. As the present leases do not differ in this respect from those where title to the oil and gas is said to pass only on severance by the lessee, it is immaterial that under the local law title is deemed to pass before severance. P. 110.

8. In computing income of the lessor from an oil and gas lease, the depletion allowance of the Revenue Act of 1924, § 214a (9) is applicable to bonus payments. Pp. 111–112.

56 F. (2d) 153, reversed.

CERTIORARI, 286 U. S. 536, to review the reversal of an order of the Board of Tax Appeals, 19 B. T. A. 376, which had sustained a deficiency assessment with respect to the respondent's income from oil and gas leases.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *A. H. Conner* were on the brief, for petitioner.

Messrs. Robert Ash and *A. H. Britain,* with whom *Mr. Harry C. Weeks* was on the brief, for respondent.

Mr. Walter E. Barton, by leave of Court, filed a brief as *amicus curiae.*

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent, the owner in fee of Texas oil lands, executed oil and gas leases of the lands for three years and as long thereafter as oil or gas should be produced from them by the lessee, in return for bonus payments aggregating $57,000 in cash, and stipulated royalties, measured by the production of oil and gas by the lessee. In making his income tax returns under the Revenue Act of 1924 for the years 1924 and 1925, respondent reported the cash payments as gain from a sale of capital assets, taxable under the applicable section of the statute at a lower rate than other income. The Commissioner treated the pay-

ments as ordinary income taxed at the higher rate, and gave respondent notice of assessment for the deficiency. The order of the Board of Tax Appeals upholding the assessment, 19 B. T. A. 376, was reversed by the Court of Appeals for the Fifth Circuit, 56 F. (2d) 153, following its earlier decision in *Ferguson* v. *Commissioner,* 45 F. (2d) 573. It was held that because Texas law, unlike that of other states, regards an oil and gas lease as a present sale of the oil and gas in place, the gain resulting from the cash payment received as consideration for the leases was taxable only as gain from the sale of capital assets. This Court granted certiorari, 286 U. S. 536, to resolve a conflict of the decision below with that of the Court of Claims, under corresponding provisions of the Revenue Act of 1921, in *Hirschi* v. *United States,* 67 Ct. Cls. 637.

The Revenue Act of 1924, c. 234, 43 Stat. 262, like that of 1921, c. 136, 42 Stat. 232, taxed certain income derived from capital gains at a lower rate than other income. By § 208 (a) (1) "The term 'capital gain' means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921." By § 208 (a) (8) "capital assets" means property held by the taxpayer for more than two years but does not include property "which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business." Related provisions of the section define "capital loss" and "capital deductions" which, in some circumstances, are allowed as deductions from capital gain in order to arrive at the net gain taxed at the lower rate. The only question presented here is whether the bonus payments to the respondent, after allowed deductions, if any, are "gain from the sale or exchange of capital assets" within the meaning of the taxing act.

Before the Act of 1921, gains realized from the sale of property were taxed at the same rates as other income, with the result that capital gains, often accruing over long periods of time, were taxed in the year of realization at the high rates resulting from their inclusion in the higher surtax brackets. The provisions of the 1921 revenue act for taxing capital gains at a lower rate, reënacted in 1924 without material change, were adopted to relieve the taxpayer from these excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions. House Report No. 350, Ways and Means Committee, 67th Cong., 1st Sess. on the Revenue Bill of 1921, p. 10; see *Alexander* v. *King*, 46 F. (2d) 235.

It is an incident of every oil and gas lease, where production operations are carried on by the lessee, that the ownership of the oil and gas passes from the lessor to the lessee at some time and the lessor is compensated by the payments made by the lessee for the rights and privileges which he acquires under the lease. But notwithstanding this incidental transfer of ownership, it is evident that the taxation of the receipts of the lessor as income does not ordinarily produce the kind of hardship aimed at by the capital gains provision of the taxing act. Oil and gas may or may not be present in the leased premises, and may or may not be found by the lessee. If found, their abstraction from the soil is a time-consuming operation and the payments made by the lessee to the lessor do not normally become payable as the result of a single transaction within the taxable year, as in the case of a sale of property. The payment of an initial bonus alters the character of the transaction no more than an unusually large rental for the first year alters the character of any other lease, and the taxation of the one as ordinary income does not act as a deterrent upon conversion of capital assets, any more than the taxation of the other.

Moreover, the statute speaks of a "sale," and these leases would not generally be described as a "sale" of the mineral content of the soil, using the term either in its technical sense or as it is commonly understood. Nor would the payments made by lessee to lessor generally be denominated the purchase price of the oil and gas. By virtue of the lease, the lessee acquires the privilege of exploiting the land for the production of oil and gas for a prescribed period; he may explore, drill, and produce oil and gas if found. Such operations with respect to a mine have been said to resemble a manufacturing business carried on by the use of the soil, to which the passing of title of the minerals is but an incident, rather than a sale of the land or of any interest in it or in its mineral content. *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 414, 415; see *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 521.

Long before the enactment of the capital gains provision in the 1921 Revenue Act, this Court had to determine whether a mining lease was to be regarded as a sale. In interpreting the Corporation Tax Law of 1909, it had occasion to consider the nature of the proceeds derived by the owner of mineral land from his own mining operations or from payments made to him by the lessee under a mining lease. That Act imposed an excise tax on corporations, measured by their income. Unlike the later revenue acts, it made no provision for a depletion allowance to be deducted from the proceeds of mining in order to arrive at the statutory income. It was argued that since the net result of the mining operation is a conversion of capital investment as upon a sale, the money received by the corporate owner or lessor, being its capital in a changed form, could not rightly be deemed to be income. But that argument was rejected, both with respect to the proceeds of mining operations carried on by the corporate owner on its land, *Stratton's Independence* v.

Howbert, supra; Goldfield Consolidated Mines Co. v. *Scott,* 247 U. S. 126; see *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, 114, and with respect to payments made by the lessee to the corporate lessor under the provisions of a mining lease. *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503, 521, 522; *United States* v. *Biwabik Mining Co.,* 247 U. S. 116.

Although these cases arose under the Act of 1909, before the enactment of the capital gains provision in the 1921 Act, they established, for purposes of defining "income" in a tax measured by it, that payments by lessees to lessors under mining leases were not a conversion of capital, as upon a sale of capital assets, but were income to the lessor, like payments of rent. And before the 1921 Act this Court had indicated (see *Eisner* v. *Macomber,* 252 U. S. 189, 207), what it later held, that "income," as used in the revenue acts taxing income, adopted since the Sixteenth Amendment, has the same meaning that it had in the Act of 1909. *Merchants Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, 519; see *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330, 335.

Congress legislated in the light of this history, cf. *United States* v. *Merriam,* 263 U. S. 179, 187; and, in the absence of explicit language indicating a different purpose, it cannot be taken to have intended that an oil and gas lease under the capital gains provision, any more than a mineral lease under the earlier acts, should be treated like an ordinary sale of land or chattels, resulting in a conversion of capital assets. Such a construction would have disregarded legislative and judicial history of persuasive force; it would have adopted a distorted rather than the common meaning of the term "sale," see *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 561, and would have tended to defeat rather than further the purpose of the Act.

The respondent does not challenge the correctness of the construction of the statute which we adopt,[1] when applied to oil and gas leases under which the title to the oil and gas passes to the lessee only on severance from the leasehold. But it is argued that the section cannot be so applied to the bonus payments received by the lessor in the present case, because, under Texas law, an oil and gas lease operates immediately upon its execution to pass the title of the oil and gas, in place, to the lessee, and it is thus a sale of the oil and gas and a conversion of capital assets within the precise terms of § 208.

In *Group No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279, this Court recognized that oil and gas leases have been characterized, in the decisions of the Texas courts, as present sales of the oil and gas in place, and we applied the rule of those decisions that ownership of the oil and gas passes from lessor to lessee on execution of the lease. There the question was not one of the interpretation of a federal statute, but of the power of the federal government to levy a tax upon the income of a lessee of state lands, derived from the sale of oil and gas abstracted by him from the land. It was objected that the tax was not within the power of the federal government because imposed on income derived from an instrumentality of the state. If the oil and gas had ceased to be property of the state before its removal by the lessee, it had, under the decisions of this Court, ceased to be an instrumentality of the state, and the income derived from it was within the taxing power of the national government. Whether the title

[1] The capital gains provision of the 1921 Act (§ 206) was held not to embrace receipts of the lessor from an oil and gas lease in *Burkett* v. *Commissioner,* 31 F. (2d) 667; *Berg* v. *Commissioner,* 33 F. (2d) 641; *Hirschi* v. *United States,* 67 Ct. Cl. 637; *Ferguson* v. *Commissioner,* 59 F. (2d) 891; and in *Alexander* v. *King,* 46 F. (2d) 235, a similar construction was placed upon the like provisions of the 1924 Act.

had so passed was a question of state law, and the affirmative answer of the state courts necessarily led to the conclusion that the lessee's income was not immune from federal income tax. Compare *Burnet* v. *Coronado Oil Co.*, 285 U. S. 393, 399.

Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation. See *Weiss* v. *Weiner*, 279 U. S. 333, 337; *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110; *United States* v. *Childs*, 266 U. S. 304, 309. State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law. See *Crooks* v. *Harrelson*, 282 U. S. 55; *Poe* v. *Seaborn*, 282 U. S. 101; *United States* v. *Loan & Building Co.*, 278 U. S. 55; *Tyler* v. *United States*, 281 U. S. 497; see *Von Baumbach* v. *Sargent Land Co., supra*, 519.

But § 208 neither says nor implies that the determination of "gain from the sale or exchange of capital assets" is to be controlled by state law. For the purpose of applying this section to the particular payments now under consideration, the Act of Congress has its own criteria, irrespective of any particular characterization of the payments in the local law. See *Weiss* v. *Weiner*, *supra*, 337. The state law creates legal interests but the federal statute determines when and how they shall be taxed. We examine the Texas law only for the purpose of ascertaining whether the leases conform to the standard which the taxing statute prescribes for giving the favored treatment to capital gains. Thus tested we find in the

Texas leases no differences from those leases where the title to the oil and gas passes only on severance by the lessee, which are of sufficient consequence to call for any different application of § 208. The fact that title to the oil and gas is said to pass before severance, rather than after, is not such a difference. The economic consequences to the lessor of the two types of lease are the same. Under both, the payments made by the lessee are consideration for the right which he acquires to enter upon and use the land for the purpose of exploiting it, as well as for the ownership of the oil and gas; under both the bonus payments are paid and retained, regardless of whether oil or gas is found and despite the fact that all which is not abstracted will remain the property of the lessor upon termination of the lease.

Title to the oil and gas likewise passes from the land owner when he conducts mining operations on his own land. But, as was pointed out in *Stratton's Independence* v. *Howbert,* since that is only an incident to the use of his land for oil production, the operation, considered in its entirety, cannot be viewed as a sale or a conversion of capital assets. Like considerations govern here.

The court below thought that the bonus payments, as distinguished from the royalties, should be treated as capital gain, apparently because it assumed that the statute authorizes a depletion allowance upon the royalties alone. See *Ferguson* v. *Commissioner,* 45 F. (2d) 573, 577. But bonus payments to the lessor have been deemed to be subject to depletion allowances under § 214a (9), Revenue Act of 1924, by Art. 216, Treasury Regulations 65, as well as under earlier acts. § 214 a (10), Revenue Act of 1921, Art. 215, Treasury Regulations 62. Cf. *Murphy Oil Co.* v. *Burnet,* 55 F. (2d) 17. The distinction, so far as we are advised, has not been taken in any other case. See *Alexander* v. *King, supra; Ferguson* v. *Commissioner,* 59 F. (2d) 891; Appeal of Nelson Land & Oil Co., 3 B. T. A.

315; *Burkett* v. *Commissioner*, 31 F. (2d) 667, and see the same case before the Board of Tax Appeals, 7 B. T. A. 560; *Berg* v. *Commissioner*, 33 F. (2d) 641; *Hirschi* v. *United States*, *supra*. We see no basis for it. Bonus and royalties are both consideration for the lease and are income of the lessor. We cannot say that such payments by the lessee to the lessor, to be retained by him regardless of the production of any oil or gas, are any more to be taxed as capital gains than royalties which are measured by the actual production. See *Work* v. *Mosier*, 261 U. S. 352, 357–358.

Reversed.

GEBARDI ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 97. Argued October 10, 1932.—Decided November 7, 1932.

1. Section 2 of the Mann Act imposes a penalty upon "Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery or for any other immoral purpose . . ." *Held:*

   That a woman who is the willing object of such transportation, but who does not aid or assist otherwise than by her consent, is not guilty of the offense. P. 119.

2. A woman merely acquiescing in her transportation by a man, for immoral conduct between them, in violation of § 2 of the Mann Act, does not thereby commit the crime of conspiring to commit the substantive offense of which by the transportation he alone becomes guilty. P. 123.

   So *held*, upon the ground that as Congress set out in the Mann Act to deal with cases which involve consent and agreement on the part of the woman in every case in which she is a voluntary agent at all, the failure of the Act to condemn her participation in transportation effected with her mere consent evinces an affirmative legislative policy to leave her acquiescence unpunished.

This policy would be contravened were it to be held that the very passage of the Mann Act effected a withdrawal, by the earlier conspiracy statute, of that immunity which the Act itself confers.
57 F. (2d) 617, reversed.

CERTIORARI, 286 U. S. 539, to review the affirmance of convictions and sentences of the petitioners, a man and a woman, for alleged conspiracies, in three counts.

Mr. William F. Waugh for petitioners.

It is erroneous to divide a single conspiracy into several and to impose the maximum sentence on each count.

The *Holte* case, 236 U. S. 140, merely decided that it was possible for a woman to be a co-conspirator under certain circumstances, and that the indictment would survive a demurrer. The case does not hold that the consent of a woman to be transported under any circumstances establishes her guilt as a conspirator. See dissenting opinion below.

Furthermore, in the *Holte* case, the conspiracy charged was for transportation of the woman "for purposes of prostitution," implying promiscuity of intercourse. In the present case the object alleged was, in effect, adultery.

The indictment also charged that there were others than petitioners involved in the conspiracy, and it is conceivable that a number of persons may conspire that two of them commit adultery. It may be, therefore, that the indictment would, under the rule in the *Holte* case, have successfully withstood an attack as to its sufficiency in law, but as the proof limited the activities entirely to petitioners, there is neither proof nor contention that any other people were the unknown conspirators mentioned in the indictment.

It has been uniformly held that where the cooperation of two people is necessary to complete an act which when consummated is a crime, such coöperation constitutes the

substantive crime and may not be bent to conspiracy to commit that offense. *United States* v. *Dietrich,* 126 Fed. 664; *United States* v. *Sager,* 49 F. (2d) 725. See, e. g., as to adultery, *Shannon* v. *Commonwealth,* 14 Pa. 226; *Iowa* v. *Law,* 179 N. W. 145 and cases cited; II Wharton's Crim. Law, 11th ed., § 1602, p. 1746. In *Corbett* v. *United States,* 299 Fed. 27, the point here made was not presented or considered.

Proof of immoral relations between the parties during their trip did not establish—surely not beyond a reasonable doubt—that that was the object of the transportation.

Assistant Attorney General Richardson, with whom *Solicitor General Thacher, Assistant Attorney General Dodds,* and *Mr. W. Marvin Smith* were on the brief, for the United States.

The defendants' agreement that the defendant Rolfe should be transported by her codefendant for an immoral purpose constituted conspiracy to violate the White Slave Traffic Act. *United States* v. *Holte,* 236 U. S. 140.

In that case the Court was plainly of the opinion that there is no reason "for not treating the preliminary agreement" of the parties "as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim." See also *Corbett* v. *United States,* 299 Fed. 27, 29–30. The Act reaches not only "commercial vice," but applies as well to transportation for an immoral purpose which is not accompanied by expectation of pecuniary gain. *Caminetti* v. *United States,* 242 U. S. 470.

Proof of agreement between the parties would have been wholly unnecessary to sustain a prosecution for commission of the substantive offense. As was said in the *Holte* case, p. 145, "The substantive offence might be

committed without the woman's consent, for instance, if she were drugged or taken by force." But where the parties confederate and agree that the Act shall be violated, something is added beyond a mere violation of that statute. It is this added element of agreement or confederation which supplies the basis for a charge of conspiracy, and brings the case within the ordinary rule that a conspiracy constitutes a different offense from that which is the object of the conspiracy. *United States* v. *Rabinowich*, 238 U. S. 78. The distinction between such a case and those cited by the defendants is that the crimes considered in those cases (agreeing to receive a bribe, etc.), could not be consummated in the absence of agreement or concurrence of the parties, which thus became an essential part of the offense and precluded a charge of conspiracy. Here agreement or concurrence is not essential to the commission of the substantive offense, and consequently, as was said in the *Holte* case (p. 145), "the decisions that it is impossible to turn the concurrence necessary to effect certain crimes such as bigamy or dueling into a conspiracy to commit them do not apply."

There was substantial evidence that there were three conspiracies, as charged in the indictment.

There was substantial evidence that the transportation was for an immoral purpose. The defendants' immoral relations were not casual incidents of journeys undertaken for other purposes.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on certiorari, 286 U. S. 539, to review a judgment of conviction for conspiracy to violate the Mann Act (36 Stat. 825; 18 U. S. C., § 397 *et seq.*). Petitioners, a man and a woman, not then husband and

wife, were indicted in the District Court for Northern Illinois, for conspiring together, and with others not named, to transport the woman from one state to another for the purpose of engaging in sexual intercourse with the man. At the trial without a jury there was evidence from which the court could have found that the petitioners had engaged in illicit sexual relations in the course of each of the journeys alleged; that the man purchased the railway tickets for both petitioners for at least one journey, and that in each instance the woman, in advance of the purchase of the tickets, consented to go on the journey and did go on it voluntarily for the specified immoral purpose. There was no evidence supporting the allegation that any other person had conspired. The trial court overruled motions for a finding for the defendants, and in arrest of judgment, and gave judgment of conviction, which the Court of Appeals for the Seventh Circuit affirmed, 57 F. (2d) 617, on the authority of *United States* v. *Holte,* 236 U. S. 140.

The only question which we need consider here is whether, within the principles announced in that case, the evidence was sufficient to support the conviction. There the defendants, a man and a woman, were indicted for conspiring together that the man should transport the woman from one state to another for purposes of prostitution. In holding the indictment sufficient, the Court said (p. 144):

"As the defendant is the woman, the District Court sustained a demurrer on the ground that although the offence could not be committed without her she was no party to it but only the victim. The single question is whether that ruling is right. We do not have to consider what would be necessary to constitute the substantive crime under the act of 1910 [the Mann Act], or what evidence would be required to convict a woman under an indictment like

this, but only to decide whether it is impossible for the transported woman to be guilty of a crime in conspiring as alleged."

The Court assumed that there might be a degree of coöperation which would fall short of the commission of any crime, as in the case of the purchaser of liquor illegally sold. But it declined to hold that a woman could not under some circumstances not precisely defined, be guilty of a violation of the Mann Act and of a conspiracy to violate it as well. Light is thrown upon the intended scope of this conclusion by the supposititious case which the Court put (p. 145):

"Suppose, for instance, that a professional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the act of 1910 in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York, she would be within the letter of the act of 1910 and we see no reason why the act should not be held to apply. We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim."

In the present case we must apply the law to the evidence; the very inquiry which was said to be unnecessary to decision in *United States* v. *Holte, supra.*

First. Those exceptional circumstances envisaged in *United States* v. *Holte, supra,* as possible instances in which the woman might violate the act itself, are clearly not present here. There is no evidence that she purchased the railroad tickets or that hers was the active or moving spirit in conceiving or carrying out the transportation. The proof shows no more than that she went willingly upon the journeys for the purposes alleged.

Section 2 of the Mann Act [1] (18 U. S. C. § 398), violation of which is charged by the indictment here as the object of the conspiracy, imposes the penalty upon "Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery or for any other immoral purpose . . ." Transportation of a woman or girl whether with or without her consent, or causing or aiding it, or furthering it in any of the specified ways, are the acts punished, when done with a purpose which is immoral within the meaning of the law. See *Hoke* v. *United States,* 227 U. S. 308, 320.

The Act does not punish the woman for transporting herself; it contemplates two persons—one to transport and

[1] "Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court."

the woman or girl to be transported. For the woman to fall within the ban of the statute she must, at the least, "aid or assist" someone else in transporting or in procuring transportation for herself. But such aid and assistance must, as in the case supposed in *United States* v. *Holte, supra,* 145, be more active than mere agreement on her part to the transportation and its immoral purpose. For the statute is drawn to include those cases in which the woman consents to her own transportation. Yet it does not specifically impose any penalty upon her, although it deals in detail with the person by whom she is transported. In applying this criminal statute we cannot infer that the mere acquiescence of the woman transported was intended to be condemned by the general language punishing those who aid and assist the transporter,[2] any more than it has been inferred that the purchaser of liquor was to be regarded as an abettor of the illegal sale. *State* v. *Teahan,* 50 Conn. 92; *Lott* v. *United States,* 205 Fed. 28; cf. *United States* v. *Farrar,* 281 U. S. 624, 634. The penalties of the statute are too clearly directed against the acts of the transporter as distinguished from the consent of the subject of the transportation. So it was intimated in *United States* v. *Holte, supra,* and this conclusion is not disputed by the Government here, which contends only that the conspiracy charge will lie though the woman could not commit the substantive offense.

Second. We come thus to the main question in the case, whether, admitting that the woman, by consenting, has

[2] Sec. 3 of the Act (18 U. S. C., § 399), directed toward the persuasion, inducement, enticement or coercion of the prohibited transportation, also includes specifically those who "aid or assist" in the inducement or the transportation. Yet it is obvious that those words were not intended to reach the woman who, by yielding to persuasion, assists in her own transportation.

not violated the Mann Act, she may be convicted of a conspiracy with the man to violate it. Section 37 of the Criminal Code (18 U. S. C, § 88), punishes a conspiracy by two or more persons "to commit any offense against the United States." The offense which she is charged with conspiring to commit is that perpetrated by the man, for it is not questioned that in transporting her he contravened § 2 of the Mann Act. Cf. *Caminetti* v. *United States,* 242 U. S. 470. Hence we must decide whether her concurrence, which was not criminal before the Mann Act, nor punished by it, may, without more, support a conviction under the conspiracy section, enacted many years before.[3]

As was said in the *Holte* case (p. 144), an agreement to commit an offense may be criminal, though its purpose is to do what some of the conspirators may be free to do alone.[4] Incapacity of one to commit the substantive offense does not necessarily imply that he may with impunity conspire with others who are able to commit it.[5]

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[3] Sec. 30, Act of March 2, 1867 (14 Stat. 471, 484) "except for an omitted not relevant provision, . . . has continued from that time to this, in almost precisely its present form." See *United States* v. *Gradwell,* 243 U. S. 476, 481.

[4] The requirement of the statute that the object of the conspiracy be an offense against the United States, necessarily statutory, *United States* v. *Hudson,* 7 Cranch 32, avoids the question much litigated at common law (see cases cited in Wright, The Law of Criminal Conspiracies [Carson ed. 1887] and in Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393) of the Criminality of combining to do an act which any one may lawfully do alone.

[5] So it has been held repeatedly that one not a bankrupt may be held guilty under § 37 of conspiring that a bankrupt shall conceal property from his trustee (Bankruptcy Act § 29[b], 11 U. S. C., § 52). *Tapack* v. *United States,* 220 Fed. 445, certiorari denied 238 U. S. 627; *Jollit* v. *United States,* 285 Fed. 209, certiorari denied 261 U. S. 624; *Israel* v. *United States,* 3 F. (2d) 743; *Kaplan* v. *United States,* 7 F. (2d) 594, certiorari denied 269 U. S. 582. And see *United States* v. *Rabinowich,* 238 U. S. 78, 86, 87. These cases proceed upon the

For it is the collective planning of criminal conduct at which the statute aims. The plan is itself a wrong which, if any act be done to effect its object, the state has elected to treat as criminal, *Clune* v. *United States,* 159 U. S. 590, 595. And one may plan that others shall do what he cannot do himself. See *United States* v. *Rabinowich,* 238 U. S. 78, 86, 87.

But in this case we are concerned with something more than an agreement between two persons for one of them to commit an offense which the other cannot commit. There is the added element that the offense planned, the criminal object of the conspiracy, involves the agreement of the woman to her transportation by the man, which is the very conspiracy charged.

Congress set out in the Mann Act to deal with cases which frequently, if not normally, involve consent and agreement on the part of the woman to the forbidden transportation. In every case in which she is not intimidated or forced into the transportation, the statute necessarily contemplates her acquiescence. Yet this acquiescence, though an incident of a type of transportation specifically dealt with by the statute, was not made a crime under the Mann Act itself. Of this class of cases we say that the substantive offense contemplated by the statute itself involves the same combination or community of purpose of two persons only which is prosecuted here as conspiracy. If this were the only case covered by the Act, it would be within those decisions which hold, consistently

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theory (see *United States* v. *Rabinowich, supra,* 86) that only a bankrupt may commit the substantive offense though we do not intimate that others might not be held as principals under Criminal Code, § 332 (18 U. S. C., § 550). Cf. *Barron* v. *United States,* 5 F. (2d) 799.

In like manner *Chadwick* v. *United States,* 141 Fed. 225, sustained the conviction of one not an officer of a national bank for conspiring with an officer to commit a crime which only he could commit. And see *United States* v. *Martin,* 4 Cliff. 156; *United States* v. *Stevens,* 44 Fed. 132.

with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without coöperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law, *Shannon and Nugent* v. *Commonwealth,* 14 Pa. St. 226; *Miles* v. *State,* 58 Ala. 390; cf. *State* v. *Law,* 189 Iowa 910; 179 N. W. 145; see *State ex rel. Durner* v. *Huegin,* 110 Wis. 189, 243; 85 N. W. 1046, or under the federal statute.[6] See *United States* v. *Katz,* 271 U. S. 354, 355; *Norris* v. *United States,* 34 F. (2d) 839, 841, reversed on other grounds, 281 U. S. 619; *United States* v. *Dietrich,* 126 Fed. 664, 667. But criminal transportation under the Mann Act may be effected without the woman's consent, as in cases of intimidation or force (with which we are not now concerned). We assume therefore, for present purposes, as was suggested in the *Holte* case, *supra,* 145, that the decisions last mentioned do not in all strictness apply.[7] We do not rest

[6] The rule was applied in *United States* v. *N. Y. C. & H. R. R. Co.,* 146 Fed. 298; *United States* v. *Sager,* 49 F. (2d) 725. In the following cases it was recognized and held inapplicable for the reason that the substantive crime could be committed by a single individual. *Chadwick* v. *United States,* 141 Fed. 225; *Laughter* v. *United States,* 259 Fed. 94; *Lisansky* v. *United States,* 31 F. (2d) 846, certiorari denied 279 U. S. 873. The conspiracy was also deemed criminal where it contemplated the coöperation of a greater number of parties than were necessary to the commission of the principal offense, as in *Thomas* v. *United States,* 156 Fed. 897; *McKnight* v. *United States,* 252 Fed. 687; cf. *Vannata* v. *United States,* 289 Fed. 424; *Ex parte O'Leary,* 53 F. (2d) 956. Compare *Queen* v. *Whitchurch,* 24 Q. B. D. 420.

[7] It should be noted that there are many cases not constituting "a serious and substantially continued group scheme for coöperative law breaking" which may well fall within the recommendation of the 1925 conference of senior circuit judges that the conspiracy indictment be adopted "only after a careful conclusion that the public interest so requires." Att'y Gen. Rep. 1925, pp. 5, 6.

our decision upon the theory of those cases, nor upon the related one that the attempt is to prosecute as conspiracy acts identical with the substantive offense. *United States* v. *Dietrich,* 126 Fed. 664. We place it rather upon the ground that we perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished. We think it a necessary implication of that policy that when the Mann Act and the conspiracy statute came to be construed together, as they necessarily would be, the same participation which the former contemplates as an inseparable incident of all cases in which the woman is a voluntary agent at all, but does not punish, was not automatically to be made punishable under the latter. It would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers.

It is not to be supposed that the consent of an unmarried person to adultery with a married person, where the latter alone is guilty of the substantive offense, would render the former an abettor or a conspirator, compare *In re Cooper,* 162 Cal. 81, 85; 121 Pac. 318, or that the acquiescence of a woman under the age of consent would make her a co-conspirator with the man to commit statutory rape upon herself. Compare *Queen* v. *Tyrrell,* [1894] 1 Q. B. 710. The principle, determinative of this case, is the same.

On the evidence before us the woman petitioner has not violated the Mann Act and, we hold, is not guilty of a conspiracy to do so. As there is no proof that the man conspired with anyone else to bring about the transportation, the convictions of both petitioners must be

Reversed.

Mr. Justice Cardozo concurs in the result.

GRAU *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 43. Argued October 10, 1932.—Decided November 7, 1932.

1. An affidavit which merely asserts affiant's belief in the truth of statements made in the affidavit of another, to which it refers, is insufficient to support the issuance of a search warrant. P. 127.
2. An affidavit setting forth facts tending to show that the dwelling described was used as a manufactory of intoxicating liquors, but which states no facts from which a sale, on or off the premises, necessarily is to be inferred, is insufficient to support the issuance of a search warrant. National Prohibition Act, Title II, § 25; Act of June 15, 1917, Title XI, § 6. P. 128.
3. The guaranties of the Fourth Amendment are to be liberally construed to prevent impairment of the protection extended. *Id.*
4. Section 25 of Title II of the National Prohibition Act was intended to preserve the citizen's right to immunity from unreasonable search, and it should be construed so as to effect that purpose. P. 128.
5. The evidence upon which a search warrant is based must be such as would be competent in a trial before a jury and would lead a man of prudence and caution to believe that the offense was committed. P. 128.

56 F. (2d) 779, reversed.

CERTIORARI, 286 U. S. 539, to review a judgment affirming a conviction for violation of the National Prohibition Act.

Mr. Charlton B. Thompson, with whom *Mr. Stephens L. Blakely* was on the brief, for petitioner.

The search warrant is invalid on its face because it does not state the particular grounds or probable cause for its issuance as required by § 6, Title XI, Act of June 15, 1917.

The affidavits furnished no basis for the issuance of the warrant to search a private residence because they state no facts showing sales of liquor on the premises. *Byars* v. *United States,* 273 U. S. 28; *United States* v.

Berkeness, 275 U. S. 147; *Simmons* v. *United States,* 18 F. (2d) 85; *Maccieno* v. *United States,* 270 U. S. 629; *Wagner* v. *United States,* 8 F. (2d) 581; *In re Phoenix Cereal Beverage Co.,* 58 F. (2d) 953; *United States* v. *Deloic,* 2 F. (2d) 377; *United States* v. *Palma,* 295 Fed. 149; *Thompson* v. *United States,* 22 F. (2d) 134; *Jozwich* v. *United States,* 288 Fed. 831; *Singleton* v. *United States,* 290 Fed. 130.

Probable cause for one offense can not be supplied by proof of another offense.

The narrow construction given to § 25, Title II, reverses the principles of broad construction frequently laid down by this Court.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* were on the brief, for the United States.

The court below having considered the affidavit adequate to establish probable cause for believing that the dwelling in question was being used as a "headquarters for the merchandising of liquor," we opposed the writ. We are still of the opinion that a warrant may lawfully issue to search a dwelling house thus used. *Kasprowicz* v. *United States,* 20 F. (2d) 506; *United States* v. *Berger,* 22 F. (2d) 867; *United States* v. *Vottiero,* 25 F. (2d) 346; *United States* v. *Backer,* 32 F. (2d) 936. The difficulty we experience is that upon further consideration we are unable to escape the conclusion that the allegations of the affidavit in question are not sufficiently comprehensive to support a showing that the premises were used in connection with the sale of liquor anywhere. *Nobriga* v. *United States,* 22 F. (2d) 507; *United States* v. *Deloic,* 2 F. (2d) 377; cf. *In re Herter,* 33 F. (2d) 402; *Hurley* v. *United States,* 300 Fed. 75; *United States* v. *Lepper,* 288 Fed. 136, aff'd, 295 Fed. 1017; *United States* v. *Backer,*

32 F. (2d) 936. The agent was not unaware that the place to be searched was a private dwelling, and his affidavit should have set forth the evidence of commercialism in clear, precise, and unequivocal language.

The affidavit did not show that the dwelling house was being used for any business purpose. For this purpose, it was not enough to show illegal manufacture. *Staker* v. *United States,* 5 F. (2d) 312; *Jozwich* v. *United States,* 288 Fed. 831; *United States* v. *Leach,* 24 F. (2d) 965; *United States* v. *A Certain Distillery,* 24 F. (2d) 557; *United States* v. *Jajeswiec,* 285 Fed. 789. There was nothing to show continuity of operations or any other circumstances from which it could fairly be assumed that liquor was being manufactured for commercial purposes. See *Nobriga* v. *United States,* 22 F. (2d) 507; *United States* v. *Goodwin,* 1 F. (2d) 36.

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner was convicted under an indictment in two counts, the first charging the unlawful manufacture of whisky, and the second possession of property designed for the unlawful manufacture of intoxicating liquors.[1] He complains that certain articles offered at the trial were obtained by virtue of a void search warrant and that the trial court erred in overruling a motion to quash the process and to suppress the evidence, and in admitting it at the trial. The Circuit Court of Appeals overruled errors assigned to the District Court's action and affirmed the judgment.[2]

The assertion is that the warrant is void for failure to observe the statutory requirement that it state the "par-

[1] These counts were based on U. S. Code, Tit. 27, §§ 12 and 39.

[2] 56 F. (2d), 779. Certiorari was granted to resolve a conflict of decision with other Circuits. Cf. *Giles* v. *United States,* 284 Fed. 208 (C. C. A. 1); *Simmons* v. *United States,* 18 F. (2d) 85 (C. C. A. 8).

ticular grounds or probabl cause" for issuance; and for the further reason that it is based on affidavits which do not "set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist." [3] We need not consider the alleged defect of the warrant, as we think the objection to the affidavits well taken, and the warrant consequently without lawful foundation.

Two affidavits were made before the commissioner. One purported to state the facts; the other merely asserted a belief that the statements in the first were true, and is clearly insufficient. *Byars* v. *United States*, 273 U. S. 28.

So far as material, the more detailed affidavit states that "on or about October 14, 1931, he (affiant) went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whisky, and what appeared to be corn sugar up to and into the place and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whisky mash on the premises."

Pursuant to the process issued officers seized a still, its appurtenances, and 350 gallons of whisky, and these were offered and admitted in evidence at the trial.

Section 25 of Title II of the National Prohibition Act [4] provides: "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the *unlawful sale* of intoxicating liquor, or unless it

[3] Section 25 of Title II of the National Prohibition Act (U. S. C., Tit. 27, § 39) authorizes the issuance of a search warrant in accordance with the terms of the Act of June 15, 1917 (U. S. C., Tit. 18, §§ 613–616). The matter quoted as to affidavits is contained in § 615, and that concerning warrants in § 616.

[4] U. S. C., Tit. 27, § 39.

is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house."

The affidavit fails to state the place to be searched is not a private dwelling, and the record affirmatively shows it was. At most the deposition charges the manufacture of whisky; no averment of sale is made; indeed no facts are given from which sale, on or off the premises described, necessarily is to be inferred. The court below, however, held that the facts set forth warranted a belief that the dwelling was being used as headquarters for the merchandising of liquor. This was deemed a sufficient compliance with the statutory permission for search of a dwelling if "used for the unlawful sale of intoxicating liquor."

The broad construction of the act by the Court of Appeals unduly narrows the guaranties of the Fourth Amendment, in consonance with which the statute was passed. Those guaranties are to be liberally construed to prevent impairment of the protection extended. *Boyd* v. *United States,* 116 U. S. 616, 635; *Gouled* v. *United States,* 255 U. S. 298, 304; *Go-Bart Co.* v. *United States,* 282 U. S. 344, 357. Congress intended, in adopting section 25 of Title II of the National Prohibition Act, to preserve, not to encroach upon, the citizen's right to be immune from unreasonable searches and seizures, and we should so construe the legislation as to effect that purpose.

A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles* v. *United States,* 284 Fed. 208; *Wagner* v. *United States,* 8 F. (2d) 581); and would lead a man of prudence and caution to believe that the offense has been committed. *Steele* v. *United States,* 267 U. S. 498, 504. Tested by these standards the affidavit was insufficient. While a dwelling used as a manufactory or headquarters

for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made.

The process should have been quashed, and the articles seized delivered to the petitioner. Their admission as evidence was error, and the judgment must be reversed.

Reversed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO are of opinion that the judgment should be affirmed.

UNITED STATES EX REL. STAPF v. CORSI, COMMISSIONER OF IMMIGRATION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 10. Argued October 17, 1932.—Decided November 7, 1932.

An alien seaman who had entered the United States irregularly in 1923, but under the three year limitation of the Immigration Act of 1917 was not subject to deportation, signed in 1929 as a member of the crew of an American ship for a round-trip voyage to Germany. Some time after his return he was arrested for deportation as an alien who had remained here in violation of the Act of 1924. *Held:*

1. Upon his return in 1929 the alien came from a place outside the United States within the meaning of the immigration laws, and his arrival was an entry into this country notwithstanding he was a member of the crew of an American ship which had made a round-trip voyage. P. 132.

2. That he entered without permission does not entitle him as an alien seaman to more than the sixty days stay allowed by the regulations. P. 132.

3. The statutory duty of the master to bring back to the United States a seaman who signs for a round-trip voyage could not make his entry in 1929 lawful nor confer on him the right to remain here permanently. Pp. 132–133.

4. The fact that he could not have been deported at the time he signed for the round-trip voyage could not make his status upon

his return in 1929 that of an "immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad" and thus a non-quota immigrant within § 4 of the 1924 Act, since he was not lawfully admitted for permanent residence in 1923. P. 133.

54 F. (2d) 1086, affirmed.

CERTIORARI, 285 U. S. 535, to review a judgment affirming a judgment which dismissed a writ of habeas corpus to secure the release of an alien in deportation proceedings under the Immigration Act of 1924.

Mr. Leo Stapf submitted *pro se.*

Assistant Attorney General Rugg, with whom *Solicitor General Thacher, Assistant Attorney General Dodds,* and *Messrs. Harry S. Ridgely, W. Marvin Smith,* and *Albert E. Reitzel* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

By writ of *habeas corpus* petitioner challenged the legality of his arrest for deportation as an alien alleged to have remained in the United States in violation of the terms of § 14 of the Immigration Act of 1924 (c. 190, 43 Stat., 153, 162). That section provides:

"Any alien who at any time after entering the United States is found . . . to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported . . ."

The undisputed facts are that petitioner, a German citizen, deserted his ship, the *Hansa,* February 15, 1923, in the port of New York, and remained in this country until March, 1929, when he signed as a member of the crew of a vessel of United States registry, the *America,* for a voyage to Germany and return. This vessel stayed in Germany two and a half days; but it does not appear whether petitioner went ashore. He arrived in the

United States on the return voyage in April, 1929, and was discharged from the ship, but was not examined by any immigration officer, nor did he possess an immigration visa or pay a head tax. On March 20, 1931, while working in Florida as a butcher, he was arrested on a warrant charging that he had remained in the country for a period longer than permitted by the Immigration Act of 1924 and the regulations thereunder. After hearing, an order of deportation was made. On this showing the District Court dismissed the writ, and the Circuit Court of Appeals affirmed.

The entry in 1923 was irregular, and petitioner was not entitled to remain.[1] Under the statute then in force he was subject to be deported; but such action could be taken only within three years of his entry.[2] The Immigration Act of 1924 did not alter the status of one who had unlawfully entered the country or remained after the passage of the act of 1917,[3] but abolished the three year period of

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[1] Sec. 32 of the Act of February 5, 1917, c. 29, 39 Stat. 874, 895, then in force, but since repealed by the Immigration Act of 1924, provided: "That no alien excluded from admission into the United States by any law . . . and employed on board any vessel arriving in the United States from any foreign port or place, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to regulations prescribed by the Secretary of Labor providing for the ultimate removal or deportation of such alien from the United States, . . ."

[2] Sec. 34 of the Act of February 5, 1917, c. 29, 39 Stat. 874, 896: "That any alien seaman who shall land in a port of the United States contrary to the provisions of this Act shall be deemed to be unlawfully in the United States, and shall, at any time within three years thereafter, upon the warrant of the Secretary of Labor, be taken into custody and brought before a board of special inquiry for examination as to his qualifications for admission to the United States, and if not admitted said alien seaman shall be deported . . ."

[3] Sec. 20 (d) of the Immigration Act of 1924, c. 190, 43 Stat. 153, 165: "Section 32 of the Immigration Act of 1917 is repealed, but shall remain in force as to . . . all seamen, arriving in the United States prior to the enactment of this Act."

limitation only as to those entering after 1924. Section 14, quoted *supra*; *Philippides* v. *Day*, 283 U. S. 48. The petitioner was therefore entitled to invoke immunity under the act of 1917 unless he lost it by making the voyage to Germany in 1929.

The question is whether by so doing he made a new entry into the United States which left him amenable to the provisions of the act of 1924. The court below answered in the affirmative.[4] Other Circuit Courts of Appeals have held the contrary.[5] In view of these conflicting decisions certiorari was granted.

The relator's arrival in the United States in April, 1929, was an entry into this country notwithstanding he was a member of the crew of an American ship which had made a round-trip voyage. He came from a place outside the United States, and from a foreign port or place, within the meaning of the immigration laws; *United States ex rel. Claussen* v. *Day*, 279 U. S. 398. While that case construed § 19 of the act of February 5, 1917, and the time limitation on deportation therein contained, the decision as to what constitutes an entry is equally conclusive in construing other sections of the immigration law.

That petitioner entered without permission does not entitle him as an alien seaman to more than sixty days' stay in the United States. His non-compliance with the regulations respecting such seamen can not confer upon him greater rights than if he had satisfied their requirements. *Philippides* v. *Day*, *supra*.

The statutes requiring the master of a ship, under penalties, to bring back to the United States a seaman who signs for a round-trip voyage are said to make the entry

[4] *United States ex rel. Stapf* v. *Corsi*, 54 F. (2d) 1086.

[5] *Kirk* v. *Lawrenson*, 24 F. (2d) 64 (C. C. A. 5); *Weedin* v. *Okada*, 2 F. (2d) 321 (C. C. A. 9); *Matsutaka* v. *Carr*, 47 F. (2d) 601 (C. C. A. 9).

of April, 1929, lawful. The argument, in substance based upon the theory that an American vessel is American soil, was effectively answered, as respects the requirements of the Immigration Acts, in the *Claussen* case, *supra*. Irrespective of any statutory duty to return the seaman to this country, the petitioner's entry would have been lawful had he complied with the provisions of statute and regulation for temporary sojourn as an alien seaman. The obligation of the master to return him did not, as contended, confer the right to remain here permanently.

If we are to disregard petitioner's status as an alien seaman, the law required that he should have submitted himself to inspection, should have produced an immigration visa, and paid a head tax, if as an immigrant he desired to apply for citizenship.[6] He did none of these things, and in this aspect remained here in violation of law.

The suggestion is made that since the relator could not have been deported after the expiration of three years from his original entry in 1923, his status when discharged as one of the crew of the *America* in 1929 was that of an "immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad," and thus he was a non-quota immigrant within § 4 of the act of 1924.[7] But he was not lawfully admitted for permanent residence in 1923, and his stay here can not be converted into such lawful residence by the mere fact that the then applicable statute limited the time within which deportation proceedings could be had. *United States ex rel. Georgas* v. *Day*, 43 F. (2d) 917.

The judgment is

Affirmed.

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[6] U. S. C., Tit. 8, §§ 132, 167 (a), 202, 203, 204. 205, 208.

[7] U. S. C., Tit. 8, § 204.

NORFOLK & WESTERN RAILWAY CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 18. Argued October 19, 1932.—Decided November 7, 1932.

1. An order of the Interstate Commerce Commission requiring a railroad to carry its coal mining properties in its accounts as property not used in the service of transportation, although the mines were acquired, and are used, solely for the purpose of supplying fuel for locomotives, was within the authority of the Commission and not subject to review by the courts. P. 141.
2. The order does not operate as a denial of due process by fixing an unfair and improper rate base or basis of recapture, since it affects merely the accounting practice of the carrier. P. 141.
3. There is no right to a particular form of accounting as such, and the action of the Commission was not an abuse of power. P. 143.
4. The order was not an arbitrary and unwarranted interference with the managerial discretion of executives of the company. *Id.*
5. A carrier is not entitled to relief here from part of an order requiring that charges in its accounts for coal produced in its mines for transportation operations shall be upon the basis of the average monthly cost of production, when the Commission has indicated its willingness to reopen the case and give further consideration to this question. P. 143.

52 F. (2d) 967, affirmed.

APPEAL from a decree of a District Court of three judges dismissing a petition to enjoin the enforcement of an order of the Interstate Commerce Commission.

Messrs. D. Lynch Younger and *F. Markoe Rivinus,* with whom *Messrs. S. King Funkhouser, Harvey B. Apperson,* and *Theodore W. Reath* were on the brief, for appellant.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher,* and *Messrs. Charles H. Weston, William G. Davis, Elmer B. Collins, Daniel W.*

Knowlton, and *Nelson Thomas* were on the brief, for the United States and the Commission.

The Commission's order required appellant to enter its mining investments in its accounts as non-transportation property, to account for the attendant revenues and expenses as arising from miscellaneous operations, and to charge to its railway operating expenses the average monthly production cost per ton of coal produced in the collieries for consumption in appellant's transportation operations. Wholly apart from the technical question whether the mines are used for transportation service, the Commission's order must be sustained as a reasonable exercise of its powers under § 20 of the Act. The sole effect of the Commission's order is to require appellant to keep its accounts in the prescribed manner. There is nothing in the order or in the Act which makes the Commission's determination that these mines are not transportation properties final for rate-making purposes.

The Commission's order and pertinent classification tended to preserve uniformity in carrier accounts generally, which was one of the principal objects sought by § 20 of the Act. Furthermore, the order did not deprive appellant of an opportunity to earn a return on its investment in the collieries. Appellant may claim as a part of the cost of the coal produced allowances for depletion, depreciation, and carrying charges on the investment. Appellant offers no valid reason for disturbing the non-carrier classification of mining properties consented to by it and other carriers over a period of many years. *Kansas City Southern Ry. Co.* v. *United States,* 231 U. S. 423, 441; *Interstate Commerce Commn.* v. *Goodrich Transit Co.,* 224 U. S. 194, 211, 212.

Analysis of the essential character of appellant's mining operations requires the classification of its investment as nontransportation. The business of mining coal is

entirely separate from that of transportation. The mere fact that the mines supply a needed facility does not stamp them as transportation properties. The manufacture of rails, ties, and cars for carrier use provides needed facilities, yet it could hardly be contended that these are common carrier activities. Such activities naturally invite private enterprise and need not be engaged in by carriers. See *Santa Fe, P. & P. Ry. Co.* v. *Grant Bros. Construction Co.*, 228 U. S. 177, 186; *State* v. *Commissioners*, 23 N. J. L. 510; *Eldridge* v. *Smith*, 34 Vt. 484.

The mining properties are not devoted to the public use as are the carrier's lines and usual facilities. Since § 20 of the Act was designed principally to inform the Commission as to matters within its regulatory power, it is reasonable that properties not devoted to public use and subject to regulation should be separately classified. The business of mining, moreover, is not commerce and can therefore hardly be regarded as constituting transportation. *Delaware, L. & W. R. Co.* v. *Yurkonis*, 238 U. S. 439; *United Mine Workers* v. *Coronado Coal Co.* 259 U. S. 344, 407; *Oliver Mining Co.* v. *Lord*, 262 U. S. 172, 178.

That the ownership of coal mines by a carrier is distinct and separate from the transportation service which it performs is apparent from the fact that the law does not permit such ownership to interfere with the carrier's obligation to furnish equal transportation service to all alike. *Delaware, L. & W. R. Co.* v. *United States*, 231 U. S. 363, 370; *Assigned Car Cases*, 274 U. S. 564.

If the mines are not treated as property but as a supply of consumable coal, as suggested by appellant in the court below, the Commission's order denying a carrier classification is likewise justified. Applicable valuation decisions do not support the inclusion in the rate base of property not used and for which there is no imminent need. *Houston* v. *Southwestern Bell Tel. Co.*, 259 U. S. 318, 324;

Bluefield Water Works v. *Bluefield*, 262 U. S. 679; 690; *Minnesota Rate Cases*, 230 U. S. 352, 434; *Spring Valley Waterworks* v. *San Francisco*, 192 Fed. 137, 156; *Consolidated Gas Co.* v. *New York*, 157 Fed. 849.

The Commission's determination that these mines are not property devoted to transportation service is a determination of fact by a tribunal "informed by experience" and is entitled to great weight. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 665–666.

If appellant's mining operations have yielded savings, this is not relevant in the determination of the proper classification of mines. Its estimate as to the amount of savings is excessive. In view of the more reasonable distribution of carrying charges which would result, a non-carrier classification is in the public interest.

Mr. Justice Roberts delivered the opinion of the Court.

The Interstate Commerce Commission issued an order pursuant to § 20[1] of the Interstate Commerce Act, as amended, requiring the Norfolk & Western Railway Company to carry certain coal mining properties in its accounts as not used in the service of transportation. The railway filed a petition in the District Court to enjoin the enforcement of the order, and from a decree of dismissal by a District Court, of three judges, this appeal was taken.

During the period between 1917 and 1920 the railway experienced difficulty in obtaining an adequate supply of coal of satisfactory quality for use in its locomotives. In an effort to meet this situation and to reduce costs of operation three coal mines, adjacent to the right of way, were acquired, the terms of purchase being that they should be used solely for the supply of locomotive fuel. The investment was, as of September 30, 1928, after deb-

[1] U S. C., Tit. 49, § 20.

its for depreciation and depletion, $2,650,467.28. The estimate is that the coal in the three mines will be exhausted in seventeen years, thirty-three years, and thirty-five years respectively. The entire output, except for a trifling amount furnished to mine employees, is consumed in carrier activities. The collieries furnish approximately forty-eight per cent. of the railway's requirements.

A general order of the Commission, in force long prior to the company's purchase of the mines, required such assets to be shown under Account 705, "Miscellaneous Physical Property," which included investments in physical property not used in transportation. Since acquisition of the first of the mines the railway has carried the investment in this account. In 1927 the company addressed a letter to the Commission requesting permission to transfer the investment from Account 705 to Account 701, which comprises investment in road and equipment. Thereupon an *ex parte* order was made directing that, as theretofore, the cost of the collieries should appear in Account 705. On petition a hearing was afforded, after which the Commission entered the order now under attack, prescribing that the investment be carried under Account 705, and providing further that the charges to Account 716, "Material and Supplies," for coal produced for consumption in appellant's transportation operations, be upon the basis of the average monthly cost per ton of producing coal; adding that if necessity should appear the proceeding would be reopened for the purpose of considering and further regulating the accounting under which the costs per ton are ascertained.

First. The Commission's order is challenged as in excess of the statutory grant of power. The concession is made that § 20 of the Act grants a discretion to prescribe a uniform system of accounts, the manner in which they shall be kept, and the forms thereof. The appellant,

however, asserts that this discretion is limited by the purposes and ends for which such accounts are to be kept, as exhibited in other sections of the Act. Reference is made to the valuation section (19a),[2] which calls upon the Commission to report "the value of all the property owned or used by every common carrier," and specifies in subparagraph (b) that as part of the investigation the Commission shall "ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier . . ." Stress is laid upon the fact that final valuations made by the Commission are to be *prima facie* evidence of the value of the property in all administrative and judicial proceedings under the Act. So also the appellant seeks support for this contention in the fair return and recapture section (15a),[3] which assures to the carrier "a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation," and for recapture of income in excess of a return of six per centum upon the value of such railway property. The phrases employed in these sections,—"in the service of transportation," and "for purposes of a common carrier,"—are said to mark the limits of the statutory power of the Commission in classifying capital assets for accounting purposes.

In view of the uncontradicted fact that the mines in question were purchased for and dedicated to the use of fuel supply and may not be used for any other purpose, the appellant deems it necessarily to follow that these assets were acquired for carrier purposes and are used in the service of transportation, and serve no other purpose or use whatsoever. The conclusion sought to be drawn is that although the Commission may exercise a reasonable discretion in prescribing the nature and form

[2] U. S. C., Tit. 49, § 19a.

[3] U. S. C., Tit. 49, § 15a.

of accounts, it has in the present instance plainly exceeded that discretion and by classifying as non-transportation property that which was acquired to serve transportation activities and promote the purposes of carriage of persons and goods, has transgressed statutory boundaries.

We must examine the origin, the purpose, the re-enactment of the statutory provision, and the practice of the Commission thereunder, to resolve the question thus presented. The authority to require annual reports from carriers and to prescribe a uniform system of accounts was conferred on the Commission by the Interstate Commerce Act of 1887,[4] and was but slightly elaborated in statement by the Hepburn Act and the Transportation Act, 1920.[5] One of the prime purposes of § 20 is and has been since the adoption of the Act of 1887, that the carriers' accounts should be uniform, so as to afford the Commission and the public a basis for comparison of their respective operations. In orders issued pursuant to this legislation the Commission, as early as 1914, drew a distinction, for purposes of accounting, between transportation and non-transportation property. The rule as to classification which appellant attacks had been in force long prior to the passage of the Transportation Act, which added to the law theretofore in effect § 15a, respecting recapture, and prior to the enactment of the Act of March 1, 1913,[6] which added § 19a, concerning valuation, to which appellant turns for the limitations it would have us read into § 20. Moreover, those sections draw the very distinction which the Commission order has long enforced. Section 15a, in referring to the fair return guaranteed the carrier, speaks not of the property as a whole, but of " the

[4] Act of February 4, 1887, c. 104, § 20, 24 Stat. 386.

[5] Act June 29, 1906, c. 3591, § 7, 34 Stat. 593; Act February 28, 1920, c. 91, §§ 434–438, 41 Stat. 493, 494.

[6] c. 92, 37 Stat. 701.

railway property held and used for the service of transportation." And § 19a commands the Commission to show separately in any report " the property held for purposes other than those of a common carrier."

Plainly, the Commission, under the authority conferred upon it by Congress, must draw a line between the two sorts of property owned by the railroads. Within broad limits that body's determination is necessarily beyond revision and correction by the courts. The record shows that it is unusual for a railroad to own mines for the production of locomotive fuel; in fact we are referred to no other similar instance. Whether the Commission should make special classifications to fit exceptional cases lies within the discretion conferred, and courts ought not to be called upon to interfere with or correct alleged errors with respect to accounting practice. If we were in disagreement with the Commission as to the wisdom and propriety of the order, we are without power to usurp its discretion and substitute our own. *Kansas City So. Ry.* v. *United States,* 231 U. S. 423, 444, 456.

Second. With great earnestness the appellant characterizes the order as in several aspects a denial of due process. It declares that by virtue of the Commission's mandate an unfair and improper rate base is fixed, and a capital asset properly to be taken into account for purposes of recapture is eliminated. But this is to ignore the fact that the order is one touching accounting merely; that before any rate base can be ascertained or any basis of recapture determined the carrier will be entitled to a full hearing as to what property shall be included; and not until the Commission excludes the assets in question from the calculation may the carrier assert the infliction of injury to its rights of property. A recapture proceeding is now pending against the appellant, wherein full opportunity will be afforded to present any claims with

regard to the inclusion in whole or in part of the mining properties in question.

We are not convinced by the assertion that the necessary effect of classifying the mines as non-carrier properties is to exclude them from consideration as capital in the issuance of securities. We are not, however, required now to decide this question, for the mere accounting classification can conclude neither the Commission nor the appellant upon the hearing of an application under § 20a (2).[7]

Denial of due process is also predicated upon the assertion that the Commission's order is wholly unsupported by the evidence. Appellant invokes the principle that due process requires not only a hearing, but a fair consideration of the evidence, and says that no effect was given to the uncontradicted testimony. The report demonstrates that the Commission did give painstaking attention to the question of the proper classification of the asset in question by comparison of mines for fuel supply with water rights, gas and power plants, locomotive and car manufacturing plants, timber lands purchased for future supply of ties, and other kinds of property which have been heretofore classified as falling partly or wholly within or without the category of transportation property. The record demonstrates that an adequate hearing was afforded and due weight given to the evidence.

Appellant also characterizes the Commission's action as a denial of the legal right of the railway to adopt fair and reasonable methods of accounting. We have shown that the order made does not affect the right to a fair return, or to determination of the full and fair value of the carrier's entire property and assets, and does not amount to a taking thereof. The objection now under

[7] U. S. C., Tit. 49, § 20a (2).

consideration asserts merely that the company is lawfully entitled to maintain a reasonable system of accounting. But there is no right to a particular form of accounting as such. Doubtless a Commission order under § 20 might be so arbitrary and outrageous as to call for correction. The present is not such a case. What has been done clearly does not amount to an abuse of power. See *Kansas City So. Ry.* v. *United States, supra.*

The order is assailed further as an undue and unwarranted interference with managerial discretion. Much is said of the wisdom and far-sightedness of obtaining an adequate supply of a commodity necessary to the continuance of the railway's transportation system. The danger of limiting or hampering railway executives in the exercise of sound discretion and good policy is stressed. But nothing in the order prevents the exercise of such policy. The basis of the Commission's order is merely that if a carrier determines to go into the business of manufacturing articles for use in connection with its activities as a carrier, such as are ordinarily purchased by railroads from independent manufacturers or producers, these shall not appear in the accounts as investments in railway property used in the service of transportation. No benefit derived from such activities is denied the carrier, nor does the required classification in any way take the property of the company or impair its value.

Third. Finally, complaint is made of that portion of the Commission's order which requires the charges to Account 716, "Material and Supplies," for coal produced from the collieries for consumption in the appellant's transportation operations, to be upon the basis of the average monthly cost for producing the coal. The objection seems to be grounded on the premise that actual cost of production is not the proper item to go into that account. The Commission, however, expressed a willingness to reopen the case and to give further consideration,

if necessary, to the method of charging coal from these mines as a cost of transportation. The record therefore fails to show that in this aspect the appellant has suffered harm from the order.

The judgment of the District Court is

Affirmed.

MR. JUSTICE BUTLER took no part in the consideration or decision of this case.

UNITED STATES *v.* GREAT NORTHERN RAILWAY CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 96. Argued October 11, 1932.—Decided November 7, 1932.

1. A payment made by the Government to a Railroad Company under the guaranty provision (§ 209) of the Transportation Act, not in excess of the amount due as then found and certified by the Interstate Commerce Commission, but an overpayment if tested by the Commission's final computation of the guaranty, five years later,—*held* not recoverable by the United States as a payment made by mistake of fact or in violation of law, the discrepancy being attributable merely to the use of different formulae for adjusting maintenance expense to fluctuations in cost of labor and material, and the superiority of one method over the other being a matter of opinion and not of mathematical precision. Pp. 151, 152.
2. A certificate issued by the Commission under § 212 (a) of the Transportation Act (added by amendment of Feb. 26, 1921,) for an amount "definitely ascertained by it to be due" to a carrier under the guaranty of § 209, is not provisional and tentative; and the fact that the amount paid under such certificate exceeds the Commission's subsequent and final certificate of the amount guaranteed to the carrier does not entitle the United States to a repayment of the excess. P. 153.
3. If the meaning of a statute be uncertain, recourse may be had to its legislative history and to the statements by those in charge of it during its consideration by Congress. P. 154.

4. The evidence does not require a holding that the Commission acted with undue haste and upon inadequate data in approving the payment here in question. P. 155.

57 F. (2d) 385, affirmed.

CERTIORARI, 286 U. S. 540, to review the affirmance of a judgment for the above-named railway company, in an action by the United States to recover a payment of money.

Solicitor General Thacher, with whom *Assistant to the Attorney General O'Brian* and *Messrs. Charles H. Weston, Elmer B. Collins,* and *Erwin N. Griswold* were on the brief, for the United States.

The United States may always recover an overpayment made by its officers.

Certifications under § 212 of the Transportation Act, 1920, are not final and binding upon the United States.

Section 209 (g) was to provide an ultimate determination of the amount of the guaranty, which would involve much time and labor and would fix property rights of carriers. Section 212 was an emergency measure, designed to afford partial and speedy relief to the carriers, many of which needed funds immediately in order to continue operations. *Northern Pac. Ry. Co.* v. *Interstate Commerce Commn.,* 23 F. (2d) 221, cert. den., 275 U. S. 572. See also *Texas & Pac. Ry. Co.* v. *United States,* 286 U. S. 285; *United States* v. *Guaranty Trust Co.,* 280 U. S. 478, 484.

This purpose presupposed prompt and necessarily tentative decisions by the Commission.

The Commission issued its partial payment certificate of March 1, 1921, through mistake or without authority of law.

Mr. F. G. Dorety, with whom *Messrs. R. E. L. Smith* and *R. J. Hagman* were on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The petitioner, the United States of America, has sued to recover a payment made to the respondent, the Great Northern Railway Company, by force of a certificate of the Interstate Commerce Commission, the government asserting that the payment was excessive and that the certificate permitting it was the product of mistake. A judgment of the District Court in favor of the respondent was affirmed by the Circuit Court of Appeals for the Eighth Circuit. 57 F. (2d) 385. The case is here on certiorari.

The respondent was a railroad under federal control when control was relinquished by the government on March 1, 1920. By the Transportation Act of that year (41 Stat. 464, § 209; 49 U. S. C., § 77), it had the protection of a guaranty as to its railway operating income for six months thereafter. The United States guaranteed that during this guaranty period the income should be not less than one-half of the annual compensation to which the carrier was entitled during the period of federal control. *United States* v. *Guaranty Trust Co.*, 280 U. S. 478; *Texas & Pacific Ry. Co.* v. *United States*, 286 U. S. 285; *Continental Tie & Lumber Co.* v. *United States*, 286 U. S. 290. Upon the Interstate Commerce Commission was laid the duty of ascertaining the amounts necessary to make good this guaranty and of certifying to the Secretary of the Treasury the results of the inquiry. Something more was required for this purpose than the mere comparison of receipts and expenses during the period of control with receipts and expenses during the six months following. In the ascertainment of railway operating income, or any deficit therein, the amount to be included in operating expenses for maintenance of way and structures, or for maintenance of equipment, was to be fixed by the Commission, and was not dependent solely on the action

of the carrier. For that purpose reference was to be had to the tests prescribed by the standard form of contract for federal control. Transportation Act, 1920, § 209f (3); Federal Control Contract, § 5a. The Commission was to take as its base the average six months' maintenance expenses of the carrier during the years characterized as "the test period," *i. e.*, the three years ending June 30, 1917. This amount was to be readjusted, however, so as to make allowance for changes in the extent of property maintained, for changes in the nature or intensity of the use, and, most important, for changes in the cost of labor and material. The end in view was the arrival at a figure that would permit the property to be kept up in the same state of reparation as at the time when the carrier's possession had been yielded to the government. The task of the Commission was not exhausted, however, when it ascertained the allowance to be made for the cost of maintenance. It was to require the restatement of other operating expenses in addition to those for maintenance "to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses" for the guaranty period, or any charge "which under a proper system of accounting is attributable to another period." Transportation Act, § 209f (5).

A task so vast and intricate exacted time and study. Many of the carriers, however, including this respondent, were in urgent need of cash for pressing obligations. The statute contained provisions that were intended to relieve the pressure. By § 209 (h) the Commission was empowered, upon application during the guaranty period, to issue certificates for advance payments, such advances to be not in excess of the "estimated amount" necessary to make good the guaranty. The Secretary of the Treasury was directed to make the advances in the amounts specified in the certificate upon the execution by the carrier of a contract, "secured in such manner as

the Secretary may determine," that upon final determination of the amount of the guaranty it would repay the excess payment with interest, if excess there should be found to be. Under the authority of that section, certificates in the amount of $6,500,000 were issued by the Commission and collected by the carrier. The payments thus received were well within the limit of the guaranty as finally determined and as to these no claim for reimbursement is put forward by the government.

The relief permissible under § 209 (h) turned out to be inadequate. It was limited to applications made before the guaranty period had expired, to applications, that is to say, before September 1, 1920. In the case of the respondent, as in that of other carriers, the guaranty period expired with the Commission still unready to announce its ultimate award, and with the pressure of the need for intermediate relief as urgent as before. Accordingly, the Transportation Act, 1920, was amended on February 26, 1921, by authorizing the Commission, if not at the time able finally to determine the whole amount due, to make its certificate for any amount definitely ascertained by it to be due, and thereafter in the same manner to make further certificates, until the whole amount due had been certified. Act of February 26, 1921, c. 72, 41 Stat. 1145, § 212; 49 U. S. C., § 79. The text of the statute is quoted in the margin.*

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* "Sec. 212. (a) In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a

At the time of the enactment of that section, the respondent had already filed with the Commission a guaranty claim in the sum of $18,498,391.67, of which $6,500,000 had already been paid through certificates issued under § 209 (h), leaving a balance of $11,998,391.67 still claimed to be due. The respondent, in submitting this claim, gave notice that it required a $6,000,000 advance to meet a pressing obligation, and asked for a certificate to that extent to be used as a basis for credit upon an application for a bank loan. Such a certificate was issued on February 23, 1921, though the Commission and the carrier understood that under the statute then in force it could not be made the basis for a payment by the Secretary of the Treasury. Three days later § 212 was added to the Transportation Act, and the legal aspect of the situation was at once transformed. At the respondent's request, the Commission cancelled its advisory certificate of February 23, 1921, and on March 1, 1921, issued a new certificate under the authority of the statute. "The Commission has ascertained and hereby certifies to the Secretary of the Treasury that the amount of six million dollars ($6,000,000) in addition to

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deficit during the period of federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

"(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement."

any sum or sums heretofore certified in favor of the carrier under § 209 of the Transportation Act, 1920, is necessary to make good to said carrier the guaranty provided by the said section. The Commission hereby certifies that such amount of six million dollars ($6,000,000) cannot be reduced by further accounting or otherwise," with which was coupled a statement that additional amounts might be found to be owing on further investigation.

The respondent, armed with this certificate, procured from the Treasury the $6,000,000 required for its present needs. This amount added to the earlier payments of $6,500,000, makes up a total of $12,500,000 collected on account of its claim against the government. The total was nearly $6,000,000 less than the amount claimed by the respondent to be ultimately due. It was about $3,200,000 less than the estimate of the final payment submitted as a basis for the certificate in a report to the Commission by the Bureau of Finance. Whatever the final payment might afterwards be found to be, the sum certified to be due left or seemed to leave a margin of error ample enough for any change within the zone of reasonable expectation.

The Commission, after satisfying thus the instant needs of the respondent, continued the investigations necessary to ascertain the final balance. Not till five years had passed was it ready to announce its findings. In the meantime it had filed a series of reports or decisions defining or revising the principles and formulae that were to govern it thereafter in the allowance or disallowance of expenditures for maintenance. See, *e. g.*, Maintenance Expenses under § 209, 70 I. C. C. 115; In the matter of Final Settlement under § 209 of the Transportation Act, 1920, 70 I. C. C. 711. By its final certificate issued on June 8, 1926, under § 209 (g), it certified that the total amount necessary to make good the guaranty was

$11,170,214.02, which was less by $1,329,786.98 than the payments already made. Cf. *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172. For the recovery of the difference with interest this action was brought.

We may assume in favor of the petitioner that a certificate issued by the Commission under § 212 of the statute is open to impeachment for fraud or mistake, and that payments burdened with those infirmities are subject to be reclaimed. If this be assumed, it does not avail without more to lay a duty of restitution upon the carrier before us. Fraud in the making of the certificate is neither proved nor even intimated. Mistake also there was none, but merely a revision of judgment in respect of matters of opinion. The respondent reported that it had paid out for maintenance during the guaranty period $28,982,000. There is no claim that this report was false even to a penny. Readjustments were needed, however, as we have already pointed out, whereby allowance might be made for fluctuations in the cost of labor and material, as well as for other economic changes, between the period of test and the period of guaranty. The formulae for the readjustment of maintenance expenditures in use by the Commission on March 1, 1921, reduced the maintenance allowance to $27,233,000, which was more than one and a half million dollars less than the expenditures actually made. The formulae in use on June 8, 1926, reduced the allowance for maintenance to $23,815,000. In this last reduction lies the explanation of the discrepancy between the partial certificate and the final one. Neither set of formulae is an expression of mathematical truth in such a sense that accuracy may be affirmed of one and error of the other. Each makes it necessary to multiply the expenses of the test period by a factor derived from an imperfect and approximate estimate of a composite change of prices. To what extent the factor is an expression of mere opinion is perceived when the process back of it is

considered. At the date of the partial certificate various items of expense during the years of the test period—the cost of locomotives, of cars, of tracks, and many others—were separately considered, and the proper percentages of increase during the period of the guaranty applied separately to each of them. At the date of the final certificate, the Commission determined to abandon these refinements. It joined together all the property of all the carriers in regional or territorial groups, and ascertained the factor of increase for the members of a group collectively. By the use of this method, the test period expense was to be "multiplied by a factor representing the increase in the general level of cost of labor and material for the territories in which the lines of railroad of the carrier are situated." A general equation factor was substituted for a series of factors separately computed and separately applied. The result, as the Commission concedes in its report, is at best an approximation representing an exercise of judgment as to the effect of a composite increase. What is thus conceded in the report as to the source of the discrepancy between the two certificates was confirmed upon the trial by the testimony of a witness for the government. The difference, he tells us, "grew out of a difference of opinion as to the method of calculation rather than out of errors in the figures submitted." The Commission has not said that in any particular case the general equation factor will yield results more accurate than those attained by the method theretofore in use. It has claimed no more for the new method than an enhancement of simplicity along with an approach to accuracy not inferior to that of the method displaced.

In these circumtances we find no basis for a holding that the payment made to the respondent under the partial certificate of March 1, 1921, was due to any mistake of fact, either unilateral or mutual. *United States* v. *Barlow,* 132 U. S. 271, 280, 281. Cf. *Gordon* v. *Butler,*

105 U. S. 553, 557, 558. The officials of the government knew precisely what they were doing, and kept well within the statute defining their authority. They did not act illegally like the officials whose acts were challenged in the cases cited by the petitioner. *Wisconsin Central R. Co.* v. *United States,* 164 U. S. 190; *Grand Trunk Western Ry. Co.* v. *United States,* 252 U. S. 112; *Burnet* v. *Porter,* 283 U. S. 230. Charged with a difficult task exacting judgment and discretion, they came to a decision in good faith with knowledge of the relevant facts and without departure from the law. If the payment under their certificate is to be reclaimed, some other ground than mistake or illegality must be found to sustain the reclamation.

Mistake and illegality being thus excluded from the reckoning, we are brought to a second ground for reclamation put forward by the government. The argument is made that by the true construction of the statute, a certificate issued by the Commission under § 212 is provisional and tentative; that upon the issuing of a final certificate of inconsistent tenor, it is superseded and nullified as to the past as well as to the future; and that payments made under its authority, though legal in the making, become illegal by retroaction. We do not so interpret the meaning of the statute. If all that the lawmakers had in view was to authorize mere advances on the basis of an estimate, the carrier remaining bound to refund the excess in the event that the estimate was thereafter found to be too high, a suitable form was at hand in § 209 (h) for the expression of their purpose. All that was necessary was to strike out the requirement that application must be made during the guaranty period, and to provide that the promise of the carrier to refund might be accepted without security. Section 209 (h), thus reframed, would have given expression with nicety to the obligation which the respondent is said to have assumed.

But § 212, as enacted, was drafted upon different lines. By subdivision *a* of the section, the Commission, if unable finally to determine the whole amount due, may make its certificate for any amount definitely ascertained by it to be due, with supplemental certificates from time to time thereafter. No longer does the statute speak, as it had spoken in § 209 (h), of "estimated amounts," and of contracts to refund any excess in the "advances." The newly authorized certificates are to represent what has been "definitely ascertained"; and moneys procured thereby are characterized no longer as "advances," but as partial or final payments. If, however, the meaning of subdivision *a* could conceivably be doubtful when considered by itself, the doubt is removed by subdivision *b*. The lawmakers foresaw that there might be "deferred debits and credits," such as unsettled damage claims, which could not be fully ascertained till a long time had gone by. Accordingly, subdivision *b* provides that the Commission shall be "authorized, in the case of deferred debits and credits which cannot at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items," the estimates so made to be "prima facie but not conclusive evidence of their correctness in the event of final settlement." The petitioners would have us hold that subdivisions *a* and *b*, parts of a single section, mean one and the same thing with all their differences of form. The contrast between them is too pointed to permit us to find identity of thought lurking dormant and concealed beneath this diversity of phrase.

Thus far we have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute. In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the

Congress. *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 278. If such recourse be had, there is confirmation of the view that the certificates were more than estimates of provisional advances. Subdivisions *a* and *b*, as originally introduced, drew no distinction as to the effect of payments made thereunder, the certificates being as conclusive under the one as under the other. A proposed amendment to modify subdivision *b* by making the effect of such certificates prima facie, but not conclusive, was carried. 60 Cong. Rec., pt. 3, pp. 2815, 2816. A separate proposed amendment to modify subdivision *a* in substantially the same way was rejected. 60 Cong. Rec., pt. 3, pp. 2812, 2815. In the discussion of these amendments, the inquiry was pressed whether the government would be helpless if the certificates were too high. The answer was emphatic that the certificates were final. 60 Cong. Rec., pt. 3, pp. 2739, 2802, 2803, 2809, 2812, 2813.

A word of answer is still due to the argument of the government that the certificate is void because the work of the commission was so hasty and imperfect as to involve an abdication of its statutory duty. Without probing at this time the legal implications of this argument, we find it without adequate basis in the facts. Whatever basis it has is in the testimony of an accountant in the service of the Commission. His conclusions are contradicted by evidence, direct and circumstantial, offered by the carrier, and contradicted also by the recitals of his superior's certificate. The record may permit an inference that the whole amount owing in order to discharge the guaranty had not been so definitely determined as to make the Commission willing to recommend a settlement in full, though even this may be uncertain. It does not command a holding that the margin of error was so inscrutable as to preclude the definitive approval of a payment on account.

Affirmed.

AMERICAN SURETY CO. *v.* BALDWIN ET AL.*

CERTIORARI TO THE SUPREME COURT OF IDAHO.

No. 3. Argued October 13, 14, 1932.—Decided November 14, 1932.

1. Where a claim of violation of federal right, based on the alleged action of the trial court in entering judgment without notice and an opportunity to be heard, was raised for the first time upon petition for rehearing (denied without opinion) in the state supreme court, although the same ground of objection had been raised throughout the proceedings but solely as a question of state law, a writ of certiorari to review the judgment will be dismissed for failure to make seasonably the federal claim. P. 162.
2. Where, upon the claim of a party that judgment was entered against him without jurisdiction in a state court, there is an adequate state remedy available, which he invokes and pursues to final judgment, the remedy by suit in the federal court is barred. P. 164.
3. Where a judgment is attacked as having been entered without jurisdiction, an appeal from an order on motion to vacate, made on a general appearance, was effective to confer jurisdiction upon the state supreme court to determine whether the trial court had jurisdiction. P. 165.
4. The full faith and credit clause applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts. P. 166.
5. Principles of *res judicata* apply to questions of jurisdiction as well as to other issues. P. 166.
6. Principles of *res judicata* may apply though proceeding was begun by motion. P. 166.
7. Decision of state supreme court wherein question of jurisdiction of trial court to enter judgment was adjudicated on appeal in a proceeding begun by motion to set the judgment aside, *held* bar to proceeding in federal court to enjoin enforcement of judgment for want of jurisdiction. Pp. 166–167.
8. While due process requires that one against whom liability on a supersedeas bond is sought to be enforced shall have opportunity to present every available defense, this need not be before entry of judgment, and a State may constitutionally provide for such a hearing by an appeal after entry of judgment. P. 168.

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* Together with No. 21, *Baldwin et al.* v. *American Surety Co.*, certiorari to the Circuit Court of Appeals for the Ninth Circuit.

9 Where opportunity to raise issue of lack of notice in state courts was lost through failure seasonably to pursue appropriate state remedy, same issue can not be utilized as basis for relief in federal court. P. 169.

50 Idaho 606, certiorari dismissed.

55 F. (2d) 555, reversed.

WRITS of certiorari, 286 U. S. 536, 537, to review judgments of the Supreme Court of Idaho and the Circuit Court of Appeals, involving the validity of a judgment against the surety company on a supersedeas bond. For opinion of federal district court, affirmed here, see 51 F. (2d) 596.

Messrs. William Marshall Bullitt and *Allan C. Rowe,* with whom *Mr. Oliver O. Haga* was on the brief, for the American Surety Co.

The surety company did not consent in advance that a judgment might be rendered against it for the amount of the judgment against Anderson, if that should be affirmed.

As the Supreme Court of Idaho expressly refused to construe either the statute or supersedeas undertaking, this Court is free to construe them, as an original proposition, according to its own views. *Merchants National Bank* v. *Richmond,* 256 U. S. 635, 638; *Carlson* v. *Washington,* 234 U. S. 103, 106.

From the bond itself one would never dream that there was a $19,573.70 judgment against Anderson; but only that there was such a judgment against the Singer Co.

The *ex parte* judgment of June 23, 1930 against the surety company was absolutely void for lack of summons or notice to it. *National Exchange Bank* v. *Wiley,* 195 U. S. 257.

A court can not acquire jurisdiction over the person of a defendant, by deciding *ex parte* that it has such jurisdiction, if in a subsequent proceeding the defendant can

show that no such personal jurisdiction existed. *Chicago Life Ins. Co.* v. *Cherry,* 244 U. S. 25, 29.

The Supreme Court of Idaho can not deprive the surety company of its right to federal protection under the due process clause by holding that the surety company should have appealed from, instead of moving to set aside, the June 23d judgment, and that having mistakenly pursued an allegedly erroneous procedure for relief, it is remediless.

Under the due process clause, the surety company was entitled to be heard before the judgment was rendered, so that it would have an opportunity to get into the record whatever it deemed essential for its protection, *Missouri* v. *North,* 271 U. S. 40, 42; *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 581; *Windsor* v. *McVeigh,* 93 U. S. 274; *Hovey* v. *Elliott,* 167 U. S. 409; *Riverside Mills* v. *Menefee,* 237 U. S. 189; *Truax* v. *Corrigan,* 257 U. S. 312, 332; *Hurtado* v. *California,* 110 U. S. 516, 535. A hearing limited to an *ex parte* record, where the injured party had no opportunity to be heard or present his proofs, does not afford due process.

The federal courts have jurisdiction to enjoin judgments in the state courts the enforcement of which would be unconscionable. *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175; *Simon* v. *Southern Ry. Co.,* 236 U. S. 115; *Marshall* v. *Holmes,* 141 U. S. 589; *Exchange National Bank* v. *Joseph Reid Co.,* 287 Fed. 870; *National Surety Co.* v. *State Bank,* 120 Fed. 593.

Mr. James F. Ailshie, Jr., for Baldwin et al.

Mr. Justice Brandeis delivered the opinion of the Court.

In each of these cases, the American Surety Company of New York seeks to be relieved from a judgment in favor of the Baldwins entered against it by an Idaho

court for $22,357.21 and interest, on a supersedeas bond. No. 3, which is here on certiorari to the Supreme Court of Idaho, brings the record of the cause in which that judgment was entered. 286 U. S. 536. No. 21 is here on certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, which reversed the decree of the federal court for Idaho denying the Surety Company's application to enjoin the enforcement of the judgment and dismissing the bill. 286 U. S. 537. In each case it is claimed that the judgment is void under the due process clause of the Fourteenth Amendment.

The bond was given upon the appeal of the Singer Sewing Machine Company and Anderson, its employee, to the Supreme Court of Idaho from a judgment for $19,500 recovered against them by the Baldwins in an Idaho district court for an automobile collision. The defendants had given a joint notice of appeal "from that certain judgment . . . against the defendants and each of them, and from the whole thereof." Pursuant to the statutes (Idaho Comp. Stat. §§ 7154 and 7155), two bonds were given by the Surety Company, both being executed only by it. One was in the sum of $300 for costs; the other was the supersedeas bond in the sum of $25,000 here in question, copied in the margin.[1] It recited that

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[1] VIVIAN F. BALDWIN and E. R. BALDWIN, Plaintiffs, *v.* SINGER SEWING MACHINE COMPANY, a Corporation, and ED. ANDERSON, Defendants.

Whereas, the defendant, Singer Sewing Machine Company, a corporation, in the above entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above entitled action and in the above entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars and for Seventy-three and 70/100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred and Seventy-three and 70/100 ($19,573.70) Dollars, and from the whole of said judgment;

"if the said judgment appealed from, or any part thereof, be affirmed" and "if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor against the undersigned surety."

And whereas, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from;

Now, therefore, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

In Witness Whereof, the said American Surety Company, has caused its name and seal to be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

AMERICAN SURETY COMPANY OF NEW YORK,
By HOWARD E. STEIN,
Attorney-in-Fact.
Countersigned:
HOWARD E. STEIN,
Agent at Boise, Idaho.

The Supreme Court affirmed the judgment as to Anderson and reversed it as to the Singer Company, *Baldwin* v. *Singer Sewing Machine Co. and Anderson,* 49 Idaho 231; 287 Pac. 944. Upon the filing of the remittitur the appropriate new judgment against Anderson was entered in the trial court. That judgment having remained unpaid more than thirty days, the Baldwins, without giving notice to either of the original defendants or to the Surety Company, moved the trial court to enter judgment against the latter. On June 23, 1930, judgment was so entered against the Surety Company in the sum of $22,357.21 and interest, with a provision "that the plaintiffs have execution therefor."

The Surety Company concedes that by executing the supersedeas bond it became, by the laws of Idaho, a party to the litigation; [2] and that if the effect of the bond was to stay the judgment as against Anderson, consent had thereby been given to the entry of judgment without notice and the judgment would be unassailable. Cf. *Pease* v. *Rathbun-Jones Engineering Co.,* 243 U. S. 273, 279. Its contention is that the bond, properly construed,

[2] The Idaho statute was so construed by the Circuit Court of Appeals for the Ninth Circuit in *United States Fidel. & Guar. Co.* v. *Fort Misery Highway Dist.,* 22 F. (2d) 369, 373, and in *Empire State-Idaho Mining & Developing Co.* v. *Hanley,* 136 Fed. 99. See also Calif. Code Civ. Proc., § 942; *Meredith* v. *Santa Clara Mining Ass'n of Baltimore,* 60 Calif. 617, 619; *Hitchcock* v. *Caruthers,* 100 Calif. 100, 103; 34 Pac. 627; *Hawley* v. *Gray Bros. Artificial Stone Paving Co.,* 127 Calif. 560, 561; 60 Pac. 437. The California provision was the prototype for the Idaho statute in question. See *Naylor & Norlin* v. *Lewiston & S. E. Elec. Ry. Co.,* 14 Idaho 722, 725; 95 Pac. 827. Compare *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U. S. 169; *Capital National Bank* v. *Board of Supervisors,* 286 U. S. 550; *Fidelity Union Casualty Co.* v. *Hanson,* 287 U. S. 599; *Louisville & Nashville R. Co.* v. *Parker,* 287 U. S. 569; *Toledo Scale Co.* v. *Computing Scale Co.,* 281 Fed. 488, affirmed 261 U. S. 399.

did not stay the judgment as against Anderson, but solely as against the Singer Company; that hence, the Surety Company had not consented to the entry of a judgment against it upon Anderson's failure to pay; and that since the judgment against it was entered without giving it notice and the opportunity of a hearing on the construction and effect of the bond, the judgment is void under the due process clause of the Fourteenth Amendment.

First. The certiorari granted in No. 3 to review the judgment rendered by the Supreme Court of Idaho on May 2, 1931 (50 Idaho 606; 299 Pac. 341) must be dismissed for failure to make seasonably the federal claim. The proceedings culminating in that judgment were these. On June 26, 1930, three days after the entry by the Idaho district court of judgment against the Surety Company on the supersedeas bond, it filed a motion in that court to vacate and set aside the judgment. The grounds there urged in support of the motion were wholly state grounds. They were that the judgment was void, because there had been no breach of condition of the bond, properly construed; that the judgment had been entered without notice to either the Surety Company or the Singer Company; and that the enforcement of the judgment would be contrary to good conscience and equity. After hearing arguments on the motion, the Idaho district court ordered that the judgment be vacated and set aside, and that the execution issued pursuant thereto be quashed. The Baldwins appealed to the Supreme Court of Idaho; and upon the presentation of their appeal no federal question was raised by either party. The Supreme Court, on May 2, 1931, reversed the order vacating the judgment. It declared that the only issue before the trial court on motion to vacate was its own jurisdiction to render the judgment against the Surety Company on the supersedeas undertaking; that such jurisdiction existed by virtue of the Surety Company's execution of the undertaking in

the cause; that the question which had necessarily been presented was: "Did the Surety Company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the supreme court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company"; that the trial court thus had the power and duty to construe the bond; that "whether it decided right or wrong its decision was a judgment which could be reviewed for error, if there was error, only by" the Supreme Court on appeal; and that the alleged error could not be raised on motion to vacate. 50 Idaho 609, 614–616; 299 Pac. 341.

The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment.[3] The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judg-

[3] The petition to this Court for a writ of certiorari, although filed October 30, 1931, was not granted until April 25, 1932, 286 U. S. 536, action thereon being withheld "awaiting the action of the Supreme Court of Idaho in the matters pending before it." Journal Sup. Ct., October Term 1931, p. 163 (Jan. 11, 1932). The actions referred to were two further steps taken by the Surety Company in the Idaho courts to be relieved of the original judgment against it. The first was a motion to correct, amend and vacate the original judgment. This motion the trial court overruled, and its order was upheld on appeal to the Supreme Court of Idaho. 52 Idaho 243; 13 P. (2d) 650, decided July 12, 1932, rehearing denied September 10, 1932. The second was a direct appeal to the Supreme Court of Idaho from the original judgment; this appeal was dismissed because taken more than 90 days after the entry of the judgment appealed from. 51 Idaho 614; 8 P. (2d) 461, decided February 21, 1932.

ment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. Compare *Corkran Oil Co.* v. *Arnaudet,* 199 U. S. 182, 193; *Godchaux Co.* v. *Estopinal,* 251 U. S. 179, 181; *Live Oak Water Users' Assn.* v. *Railroad Commn.,* 269 U. S. 354, 357. This is not a case where, as in *Saunders* v. *Shaw,* 244 U. S. 317, 320, the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court. Compare *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.,* 281 U. S. 74, 79. Nor is the federal claim based, as in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 678, upon the unanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the Constitution. Compare *Missouri ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313, 320.

Second. In No. 21, the Circuit Court of Appeals should have affirmed the decree of the federal court for Idaho which denied the Surety Company's application for an interlocutory injunction and dismissed the bill. For the federal remedy was barred by the proceedings taken in the state court which ripened into a final judgment constituting *res judicata.*

The Surety Company was at liberty to resort to the federal court regardless of citizenship, because entry of the judgment without notice, unless authorized by it, violated the due process clause of the Fourteenth Amendment, compare *National Exchange Bank* v. *Wiley,* 195 U. S. 257; *Cooper* v. *Newell,* 173 U. S. 555. And it was at liberty to invoke the federal remedy without first pursuing that provided by state procedure. *Simon* v. *Southern Ry. Co.,* 236 U. S. 115; *Atchison, Topeka & Santa*

Fe Ry. Co. v. *Wells,* 265 U. S. 101; *Firestone Tire & Rubber Co.* v. *Marlboro Cotton Mills,* 282 Fed. 811, 814. But an adequate state remedy was available; and having invoked that and pursued it to final judgment, the Surety Company cannot escape the effect of the adjudication there. Compare *Mitchell* v. *First National Bank,* 180 U. S. 471, 480–481; *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 90.

The Supreme Court of Idaho had jurisdiction over the parties and of the subject matter in order to determine whether the trial court had jurisdiction. Clearly, the motion to vacate, made on a general appearance, and the appeal from the order thereon, were no less effective to confer jurisdiction for that purpose than were the special appearance and motion to quash and dismiss held sufficient in *Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522. And there was an actual adjudication in the state court of the question of the jurisdiction of the trial court to enter judgment. The scope of the issues presented involved an adjudication of that issue. Compare *Napa Valley Elec. Co.* v. *Railroad Commn.,* 251 U. S. 366; *Grubb* v. *Public Utilities Commn.,* 281 U. S. 470, 477–478. The Supreme Court of Idaho did not refuse to adjudicate that question when it declined to "construe the legal effect of the undertaking in question further than to examine it in aid of determining the sole question of the court's jurisdiction to hear and determine the motion for judgment thereon." It narrowed the issue, according to the State procedure, by separating, in effect, the question of jurisdiction from that of liability. It held that the status of the Surety Company as a party to the litigation, by virtue of its execution of the bond in the cause, necessarily persisted, although its liability may have been limited by the terms of the bond. With the soundness of the decision we are not here concerned. It is enough that the court did not, as the Surety Com-

pany asserts, reach its decision by merely assuming the point in issue, or by deeming itself concluded by the fact that the trial court took jurisdiction. That it did not so reach its decision is made clear by the opinion itself. We are thus brought to a consideration of the effect on the present suit of the judgment of the Supreme Court of Idaho.

The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts. Act of May 26, 1790, c. 11; Act of March 27, 1804, c. 56, § 2; Rev. Stat. § 905; *Mills* v. *Duryee,* 7 Cranch 481, 485; *Insurance Co.* v. *Harris,* 97 U. S. 331, 336. Compare *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, 155. The principles of *res judicata* apply to questions of jurisdiction as well as to other issues. *Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522. They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. See *Marshall* v. *Holmes,* 141 U. S. 589, 596; *Fidelity & Deposit Co.* v. *Gaston, Williams & Wigmore,* 13 F. (2d) 267, aff'd per curiam, *id.,* 268.[4] The principles of *res judicata* may apply, although the proceeding was begun by motion. Thus, a decision in a proceeding begun by motion to set aside a judgment for want of jurisdiction is, under Idaho law, *res judicata,* and precludes a suit to enjoin enforcement of the judgment. *Bernhard* v. *Idaho Bank & Trust Co.,* 21 Idaho 598; 123 Pac. 481.[5] Since the deci-

[4] In *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, the petitioner had not been allowed to become a party to the prior litigation in the state court.

[5] The opinion in that case makes it clear that the effect of the prior judgment as a bar does not rest merely on a rule of practice or, where

sion would formally constitute *res judicata* in the courts of the state; since it in fact satisfies the requirements of prior adjudication; and since the constitutional issue as to jurisdiction might have been presented to the state Supreme Court and reviewed here, the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction. Cf. *Fidelity Nat. Bank & Trust Co.* v. *Swope,* 274 U. S. 123, 130–131.

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the second proceeding is in equity, on the adequacy of the remedy at law. The court said: "In this state the appellant had a choice between two remedies, and he chose to file his motion to vacate the judgment in the case in which the judgment was rendered upon the same facts as pleaded in the complaint in the action involved, and the court, after hearing the motion, decided the facts against the appellant, holding that the judgment was not void, and the order so holding was appealable. But appellant refused to exercise his right of appeal and brought this suit in equity to enjoin the collection of said judgment. He had his day in court in that action, and the decision of that motion upon the question of jurisdiction was *res adjudicata.* The appellant had the right either to attack said judgment by motion in the original case or by bringing this action to enjoin or to have it set aside. If he proceeded by motion, and the court decided against him, the decision of that question, until reversed upon appeal, is final and binding on the parties." 21 Idaho 598, 603–604; 123 Pac. 481.

Compare the effect, under Idaho law, of a decision on a motion to set aside a judgment because of the mistake, inadvertence, or excusable neglect of the defendant, or to allow an answer to the merits to be interposed after judgment where summons was not served personally on the defendant. Motions of this kind are allowed by express statute. Idaho Comp. Stat., § 6726. They present a matter for judicial discretion, *Mortgage Co. Holland America* v. *Yost,* 39 Idaho 489; 228 Pac. 282; and their determination does not bar a renewal motion. See *Dellwo* v. *Petersen,* 34 Idaho 697; 203 Pac. 472. But motions of this kind are to be distinguished from those attacking the judgment as void for want of jurisdiction. *Armitage* v. *Horseshoe Bend Co., Ltd.,* 35 Idaho 179; 204 Pac. 1073; *Shumake* v. *Shumake,* 17 Idaho 649; 107 Pac. 42.

Third. The Surety Company contends in No. 21 that even if the trial court of the State had jurisdiction, the federal district court may enjoin the enforcement of the judgment on the ground that, having been entered without notice and an opportunity for a hearing on the construction of the bond, it lacked due process of law. It is true that entry of judgment without notice may be a denial of due process even where there is jurisdiction over the person and subject matter. But that rule is not applicable here. For if the bond properly construed stayed the judgment as against Anderson, the Surety Company consented to the entry of judgment against it without notice for his failure to pay. If the bond did not stay the judgment as against Anderson, the trial court confessedly erred in entering the judgment on the bond. In order to contest its liability the Surety Company had the constitutional right to be heard at some time on the construction of the bond. The state practice provided the opportunity for such a hearing by an appeal after the entry of judgment.

The practice prescribed was constitutional. Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment. *York* v. *Texas,* 137 U. S. 15. Cf. *Grant Timber & Mfg. Co.* v. *Gray,* 236 U. S. 133; *Bianchi* v. *Morales,* 262 U. S. 170. See also *Phillips* v. *Commissioner,* 283 U. S. 589, 596–597; *Coffin Bros. & Co.* v. *Bennett,* 277 U. S. 29. An appeal on the record which included the bond afforded an adequate opportunity. Thus, the entry of judgment was consistent with due process of law. We need not enquire whether its validity may not rest also on the ground that the Surety Company, by giving the bond, must be taken to have consented to the state procedure. Compare *United Surety Co.* v. *American Fruit Product Co.,* 238 U. S. 140, 142; *Corn Exchange Bank* v. *Commissioner,* 280 U. S. 218, 223. The opportunity afforded by

state practice was lost because the Surety Company inadvertently pursued the wrong procedure in the state courts. Instead of moving to vacate, it should have appealed directly to the state Supreme Court. When later it pursued the proper course, the time for appealing had elapsed. The fact that its opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error, does not furnish the basis for a claim that due process of law has been denied. Compare *O'Neil* v. *Northern Colorado Irrigation Co.*, 242 U. S. 20, 26. Having invoked the state procedure which afforded the opportunity of raising the issue of lack of notice, the Surety Company cannot utilize the same issue as a basis for relief in the federal court. Federal claims are not to be prosecuted piecemeal in state and federal courts, whether the attempt to do so springs from a failure seasonably to adduce relevant facts, as in *Grubb* v. *Public Utilities Commn.*, 281 U. S. 470, 479, or from a failure seasonably to pursue the appropriate state remedy.[6]

In No. 3, writ of certiorari dismissed.
In No. 21, decree reversed.

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[6] The cases are many in which failure to comply with state rules of practice has prevented this Court from considering a federal claim on direct review. See *e. g.* cases where the claim was not considered by the highest court of the State because it was not raised by the proper procedure, *Brown* v. *Massachusetts*, 144 U. S. 573, 580; *Hulbert* v. *Chicago*, 202 U. S. 275, 281; or by the proper pleadings, *Atlantic Coast Line R. Co.* v. *Mims*, 242 U. S. 532, 535–537; *Nevada-California-Oregon Ry.* v. *Burrus*, 244 U. S. 103, 104–105; or was not raised at the proper stage of the proceedings, *Spies* v. *Illinois*, 123 U. S. 131, 181; *Baldwin* v. *Kansas*, 129 U. S. 52, 56–57; *Jacobi* v. *Alabama*, 187 U. S. 133; *Layton* v. *Missouri*, 187 U. S. 356; *Louisville & Nashville R. Co.* v. *Woodford*, 234 U. S. 46, 51; *Missouri Pacific Ry. Co.* v. *Taber*, 244 U. S. 200, 201–202; *Missouri, Kansas & Texas Ry. Co.* v. *Sealy*, 248 U. S. 363, 365; *Barbour* v. *Georgia*, 249 U. S. 454, 460; *Hartford Life Ins. Co.* v. *Johnson*, 249 U. S. 490, 493–494; cf. *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492, 496.

BROOKLYN EASTERN DISTRICT TERMINAL *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 39. Argued October 21, 1932.—Decided November 14, 1932.

1. Where one of several tugboats, all acquired, maintained and used by their owners in a regular towing business, was laid up by collision and the owner provided no substitute but took care of the business by working the other tugboats overtime, *held* erroneous, in assessing damages, to allow as demurrage the market cost of hiring a substitute during the time of repairs. P. 174.
2. "Spare boat" doctrine considered and held inapplicable. P. 176.
3. An appeal to the Circuit Court of Appeals in admiralty cases is a trial *de novo*. *Id.*
4. An assessment of damages in admiralty may be corrected on appeal if erroneous in law or extravagant in fact. *Id.*

4 F. (2d) 978, affirmed.

CERTIORARI, 286 U. S. 538, to review an admiralty decree modifying an assessment of damages in a collision case.

Mr. Leonard J. Matteson, with whom *Mr. Oscar R. Houston* was on the brief, for petitioner.

If the petitioner had maintained the third tugboat as a "spare" and had used it as a substitute in the emergency, there is no doubt that it would have been entitled to recover the reasonable hire of a boat of like capacity as the proper measure of damages for loss of use of the vessel injured. *The Cayuga,* 7 Blatchf. 385, affirmed, 14 Wall. 270; *The Favorita,* 18 Wall. 598, 603; *The Providence,* 98 Fed. 133; *New Haven Steamboat Co.* v. *New York,* 36 Fed. 716; *The Emma Kate Ross,* 50 Fed. 845; *The Priscilla,* 55 F. (2d) 32; *The State of California,* 54 Fed. 404; *The Mediana,* 1900 A. C. 113 (H. L.)

The principle is the same where, instead of maintaining two tugboats and a spare, three tugboats are kept work-

ing fewer hours. The investment, overhead and depreciation would be the same. The suggestion that the petitioner had no expense of this character is without merit. It was merely a matter of convenience which plan was adopted.

Distinguishing: *Newtown Creek Towing Co.* v. *New York,* 23 F. (2d) 486; *The Glendola,* 47 F. (2d) 206; *The Conqueror,* 166 U. S. 110.

Cf. *The Potomac,* 105 U. S. 630, 631.

Solicitor General Thacher, with whom *Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour, J. Frank Staley,* and *Wm. H. Riley, Jr.,* were on the brief, for the United States.

Petitioner has been fully compensated for the cost of repairing its tugboat, and has failed to prove any other damage. Under settled principles, the disallowance of the item for demurrage was clearly correct. *The Potomac,* 105 U. S. 630.

Since the decision in *The Conqueror,* 166 U. S. 110, the federal courts have consistently held that, in order to recover demurrage for detention of vessels injured in a collision, it is necessary to show that loss has actually been sustained as a result of the detention. *The North Star,* 151 Fed. 168; *The Winfield S. Cahill,* 258 Fed. 318; *The Wolsum,* 14 F. (2d) 371; *Cuyamel Fruit Co.* v. *Nedland,* 19 F. (2d) 489; *Newtown Creek Towing Co.* v. *New York,* 23 F. (2d) 486; *The Glendola,* 47 F. (2d) 206, cert. den., 283 U. S. 857.

The basis of applications of the "spare boat" doctrine is that the owner of the injured vessel, anticipating a time when the vessel would not be available for regular service because of a collision or other causes, had acquired and maintained an additional vessel for such emergencies so that he would not be required to hire a boat at the regular market rate to take the place of the injured vessel.

Since he would have had to pay for such hire if he had not gone to the expense of maintaining the extra boat, it is thought proper that those who caused the regular boats to be retired from service because of collisions should bear a part of the cost, commensurate with their fault, of the spare boats maintained to do the work of the regular vessels during such repair periods. The damages usually allowed where a spare boat is used are based upon the market rate of hiring a boat during the period of repairs. These cases fall within the principles laid down in *The Conqueror,* 166 U. S. 110, that the loss arising from detention must be definitely shown, for the owner is actually out of pocket for the cost of acquiring and maintaining the spare boat used in such emergencies. Thus damages have been proved with reasonable certainty.

Here the additional cost of overtime operation has not been proven. And to extend the "spare boat" doctrine to such cases would be to destroy its basis, namely, that recoverable loss must be proven with reasonable certainty.

Even if damages for detention were recoverable on any theory the award was grossly excessive.

Mr. Justice Cardozo delivered the opinion of the Court.

On September 30, 1920, the dredge Raritan, belonging to the United States, collided in New York harbor with the steam tug Integrity, belonging to the petitioner. A libel in admiralty to recover the damages to the tug was filed by the petitioner in conformity with an act of Congress whereby the United States consented to be sued. Act of February 16, 1925; c. 241, 43 Stat. 1566. A cross-libel for damages to the dredge was filed by the government. The trial court held both vessels at fault, and determined that the damages to each should be equally apportioned between the owners. A Special Commissioner was appointed to ascertain the damages and report.

The controversy hinges upon an item of demurrage. As to the repair bills ($26,114.57 for the Integrity and $2,230 for the Raritan), as well as some other items, the parties are now at one. The conflict between them, once waged along a wider front, has narrowed to a single point. The District Court, confirming the Commissioner's report, allowed demurrage to the petitioner at the rate of $150 a day, the market hire of another tug, during the seventy-eight days when the Integrity was withdrawn for repairs. This item ($11,700) the Circuit Court of Appeals excluded. 54 F. (2d) 978. A writ of certiorari has brought the case here.

The petitioner was in the business of towing car-floats for railroads between points in New York harbor. It did not use its boats for hire generally. Its business was sufficient to occupy three tugs during regular working hours in the transfer of railroad cars from one point to another. When the Integrity was laid up, the petitioner did not hire an extra tug as a substitute for the one disabled. Instead, it used its two other tugs overtime, and thus kept down the cost while doing business as before. The same crews were employed; but if extra wages were paid, the amount has not been proved. Extra wear and tear there may have been; but there is nothing in the record to indicate how much. Indeed, the witness for the petitioner frankly stated that the loss, if any, from that cause was too uncertain to be measured. The award for demurrage allowed by the District Court and disallowed by the Court of Appeals was not made upon the basis of depreciation of the boats in use. It is measured by expenses that in fact never were incurred, but that might have been incurred and charged to the respondent if the necessities of the business had been something other than they were.

Our decision may not overleap the limitations of the record. To dispose of the case before us we do not need to hold that through the use of the other vessels the pos-

sibility of all demurrage has been excluded by an inexorable rule of law. Other courts have held in situations not dissimilar that demurrage may be measured by the interest on the capital value tied up in the disabled boat during the term of disability and thus unfruitfully employed. *The Susquehanna,* [1926] A. C. 655, 663, 664; cf. *The Greta Holme,* [1897] A. C. 596. To approve or disapprove that measure is unnecessary here, for the record does not contain the figures that would enable us to apply it. Even now the petitioner is not seeking for a judgment upon that basis, nor indeed upon any other basis than the one adopted at the trial. The question narrows itself to this, whether the full-time hire of an extra boat must be charged to the respondent as damage flowing from the collision when there was no need of such a boat to keep the business going, and none in fact was used or paid for. Is an award upon that basis either erroneous in law or extravagant in fact?

Erroneous and extravagant we think it must be held to be. *The Conqueror,* 166 U. S. 110, 125, 134; *The Susquehanna, supra;* cf. *The North Star,* 151 Fed. 168; *The Wolsum,* 14 F. (2d) 371; *Cuyamel Fruit Co.* v. *Nedland,* 19 F. (2d) 489; *Newtown Creek Towing Co.* v. *New York City,* 23 F. (2d) 486; *The Glendola,* 47 F. (2d) 206. The disability of a vessel will not sustain demurrage at the rate of the value of her hire unless an award at such a rate can be seen to be reasonable when the disability is viewed in the setting of the circumstances. *The Conqueror, supra.* Only when thus enlightened can we choose the yardstick most nicely adjusted to be a measure of reparation, in some instances, no doubt, the hire of another vessel, in other instances, it may be, a return upon the idle capital (*The Susquehanna, supra*), in others something else. Only then indeed can we know whether the interference with profit or enjoyment is to be ranked

as substance or as shadow. The vessel may have been employed in a business of such a nature that for the avoidance of loss there is need of the employment of a substitute. In such circumstances the fair value of the hire may be an element of damage, and this whether the substitute is actually procured or not. Cf. *The Lagonda,* 44 Fed. 367; *The Mediana,* [1900] A. C. 113; *Perkins* v. *Brown,* 132 Tenn. 294; 177 S. W. 1158; *Cook* v. *Packard Motor Car Co.,* 88 Conn. 590; 92 Atl. 413. The vessel may be a yacht, employed for pleasure and not for business. Even then, in the judgment of many courts, the value of the use may be considered by the triers of the facts in fixing the recovery if there has been a substantial impairment of that enjoyment for which such vessels are maintained. *The Lagonda, supra; Cook* v. *Packard Motor Car Co., supra; Banta* v. *Stamford Motor Co.,* 89 Conn. 51, 56; 92 Atl. 665; *Perkins* v. *Brown, supra; Hunt Co.* v. *Boston Elevated Ry. Co.,* 199 Mass. 220, 235, 236; 85 N. E. 446; *The Astrakhan,* [1910] P. 172, 181. There are statements in *The Conqueror* (p. 133) that may be in conflict with that view, but they were not essential to the judgment (p. 134), and in the light of later decisions as to the loss of pleasure vehicles are unquestionably in opposition to a strong current of authority. See cases, *supra.* The owner of the Conqueror would not have let his yacht to any one if there had been no occasion to repair her, nor during the season that she was out of service would he have used her for himself. 166 U. S. at p. 134. There was neither interference with profit nor substantial disturbance of enjoyment. The court did not hold that even then there could be no recovery whatever. Cf. *Cook* v. *Packard Motor Car Co., supra,* at p. 596. It held that recovery was excessive when based on the returns of an imaginary letting. We are to have regard in every case to the reasonable probabilities of time

and place and circumstance. Demurrage on the basis of the cost of a substitute, actual or supposititious, may be no more than fair indemnity when gains have been lost or enjoyment seriously disturbed. Demurrage on a like basis may be so extravagant as to outrun the bounds of reason when loss of profit has been avoided without the hire of a substitute and the disturbance of enjoyment has been slight or perhaps fanciful. *The Conqueror, supra.* Cf. *Cook* v. *Packard Motor Car Co., supra,* p. 595; *The Susquehanna,* [1925] P. 196, 207, affirmed [1926] A. C. 655. A wide range of judgment is conceded to the triers of the facts in the choice of the standard to be applied and in the method of applying it. *Cook* v. *Packard Motor Car Co., supra.* The choice, however, may not be arbitrary, nor is the range of judgment without limit. We think that on the face of this award there is declared a principle of assessment that in the setting of the circumstances exceeds the bounds of any discretion allowed to the assessors. In admiralty an appeal to the Court of Appeals is deemed to be a trial *de novo. Munson Steamship Line* v. *Miramar Steamship Co.,* 167 Fed. 960; *Gilchrist* v. *Chicago Ins. Co.,* 104 Fed. 566, 571; cf. *The Abbotsford,* 98 U. S. 440; *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione,* 248 U. S. 9, 21; *Standard Oil Co.* v. *So. Pacific Co.,* 268 U. S. 146, 155. An assessment of damages may be corrected if erroneous in point of law, but also it may be corrected if extravagant in fact.

The doctrine of the "spare boat" cases is invoked by the petitioner as decisive in its favor, but we think without avail. Shipowners at times maintain an extra or spare boat which is kept in reserve for the purpose of being utilized as a substitute in the contingency of damage to other vessels of the fleet. There are decisions to the effect that in such conditions the value of the use of a boat thus specially reserved may be part of the demur-

rage. *The Cayuga,* 7 Blatch. 385, affirmed 14 Wall. 270, 278; *The Favorita,* 8 Blatch. 539, affirmed 18 Wall. 598, 603; *New Haven Steamboat Co.* v. *The Mayor,* 36 Fed. 716, 718; *The Emma Kate Ross,* 50 Fed. 845; *The Providence,* 98 Fed. 133. If no such boat had been maintained, another might have been hired, and the hire charged as an expense. The result is all one whether the substitute is acquired before the event or after. The same doctrine has been recognized in the English courts, where a boat thus held in reserve is known as a standby. *The Mediana,* [1900] A. C. 113. In those courts, however, as in our own, there has been a refusal to extend the doctrine to boats acquired and maintained for the general uses of the business. Just such a state of facts was considered by the House of Lords in *The Susquehanna, supra,* a case hardly to be distinguished from the one at hand. In the speech by Lord Sumner we are told that "the Admiralty by prompt effort and economy in consumption, acting in accordance with their obligation to minimize the damages, managed to get through their work" without the disabled vessel. "They cannot," he continued (p. 663), "get damages based on the use of a standby when in fact they did very well without one."

So here. The petitioner was engaged in an established business using tugs for a single purpose. It had no thought to turn that business into one of a different kind while this tug was out of service. Mindful of the need to minimize the damages, it used to the full its available resources, and was able by special effort to make them do the work. We are unable to accept the argument that the expenses which it saved are to be charged to the respondent as if they had not been saved at all.

The judgment of the Circuit Court of Appeals which modified the judgment of the District Court is accordingly

Affirmed.

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INTERSTATE COMMERCE COMMISSION *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 15. Argued October 17, 18, 1932.—Decided November 21, 1932.

1. Mandamus will not issue to compel an act as a statutory duty if the existence of the duty be uncertain. Pp. 191, 203.
2. Public policy forbids that the work of the Interstate Commerce Commission in valuing the railroads should be hampered by writs of mandamus, except where departure from the statute is clear. P. 204.
3. By virtue of contracts with owner and lessee railroads, the New Haven system has the perpetual right to haul its trains over tracks entering New York City, provided it pay an agreed price per passenger carried and an agreed part of its receipts from mail and express; and the perpetual right to use a New York terminal station up to 50% capacity with an equal voice in the selection and discharge of the station manager, provided it pay a part, proportionate to such use, (1) of interest on the cost of building the terminal and (2) of the cost of maintaining and operating it; also a perpetual right to use in common with other railroads terminal tracks and a station in Boston that are owned by a terminal company of which it owns 80% of the stock, provided it pay a share, proportionate to use, of the cost of maintaining and operating the terminal, of the interest on the terminal company's bonds and of dividends on that company's stock. In valuing the New Haven's property under § 19a of the Interstate Commerce Act, the Commission, following its practice in like cases, made no specific appraisal of these trackage and terminal rights; but it reported them in the inventory and may be assumed to have considered them in the appraisal of the system as a whole, the total value assigned to it being more than the aggregate values assigned to its physical parts. *Held:*

   That whether the trackage and terminal rights are to be classed as licenses or as easements, the duty to value them specifically, if it exists under the statute, is not so clearly and certainly imposed as to be enforceable by mandamus. Pp. 191, *et seq.*

4. A command to value all the property owned or used by a carrier can not mean that a separate and specific value must be allocated to every kind of property interest embraced within the whole. To what extent a group of property interests shall be resolved into its elements is a question of degree involving legislative intention and administrative judgment. Pp. 192, 194.
5. In providing, § 19a, subdivision (b), that every "piece of" property shall be inventoried and that in respect of each the Commission shall ascertain original and reproduction costs, the statute does not impose a plain and certain duty to appraise in terms of cost if the interest to be appraised be such that the cost of the thing is without relevance as a criterion of the value of the interest. P. 194.
6. That clause of subdivision (b), par. "First" of § 19a, which requires the Commission to ascertain and report separately "other values, and elements of value, if any," of the carrier's property, with the reasons for any differences between such values and the cost values, does not impose a duty, inflexible and certain, to appraise and value a use which is unrelated to the value of what is subject to the use. P. 199.
7. The valuation report is the exercise solely of the function of investigation; and though final valuations are to be *prima facie* evidence against the carrier in proceedings under the Commerce Act, the opportunity to contest them, if at any time introduced in evidence, is fully preserved to the carrier, and any error therein may be corrected at the trial. P. 204.

60 App. D. C. 403; 55 F. (2d) 1028, reversed.

Supreme Court, D. C., affirmed.

CERTIORARI, 286 U. S. 535, to review the reversal of a judgment dismissing a petition for mandamus.

Mr. Thomas M. Ross, with whom *Messrs. Charles W. Needham* and *Robert E. Freer* and *Mrs. Mary B. Linkins* were on the brief, for petitioner.

Messrs. John L. Hall and *Charles O. Pengra* for respondents.

The carrier's rights in the tracks and terminals were property. *People* v. *O'Brien,* 111 N. Y. 1.

The trackage agreement created an easement, not a mere license. *Saratoga Water Corp.* v. *Pratt,* 227 N. Y. 429, 442, 443; *Joy* v. *St. Louis,* 138 U. S. 1; *Louisville & N. R. Co.* v. *Chesapeake & O. R. Co.,* 107 Ky. 191. Distinguished: *Union Pac. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 163 U. S. 564.

The act amending the charter of the Harlem added to the agreement the advantages of a franchise. *Owensboro* v. *Cumberland Tel. & Tel. Co.,* 230 U. S. 58, 65; *Nellis* v. *Munson,* 108 N. Y. 453, 460; *Hall* v. *Turner,* 110 N. C. 292; *Proprietors of Locks* v. *Boston & M. R. Co.,* 245 Mass. 52.

The interest in the Grand Central Terminal is an estate. *Georgia* v. *Cincinnati Sou. Ry. Co.,* 248 U. S. 26; *Loomis* v. *Heublein,* 91 Conn. 146.

The interest in the South Station and its approaches is not that of a mere stockholder in the terminal company. A perpetual right to use property constitutes an estate in the property itself. *Owensboro* v. *Cumberland Tel. & Tel. Co., supra; Georgia* v. *Cincinnati Sou. Ry. Co., supra; Chicago, M. & St. P. R. Co.* v. *Des Moines Union Ry. Co.,* 254 U. S. 196.

The Commission is not authorized by § 19a to make a valuation of physical property to the exclusion of estates and other incorporeal interests therein.

There is no provision for a special or restricted valuation.

The adaptability of locations as entrances into two great communities for railroad purposes is an element of value; perhaps the chief element of value of the property. *Minnesota Rate Cases,* 230 U. S. 352, 451. This element of value in the New York tracks and terminals does not belong exclusively to the Harlem, because the New Haven has a perpetual right to enjoy it in common with others. It belongs in part to the New Haven because of its perpetual rights.

The arbitrary rule for the valuation of jointly-used property adopted by the Commission in the Texas Midland Railroad report, is inconsistent with the statute.

The proper valuation of incorporeal property would not result in duplication. The carrier is not placing any academic interpretation on the word "property." It is not using it in the constitutional sense which includes contracts, labor and other individual rights. It is not asking the Commission to value as such the agreements of March 17, 1848, and July 24, 1907. It is using "property" in the same sense as the Commission used it, namely, the tracks and the terminal; but it contends that those agreements created a property interest, an estate, an incorporeal hereditament, in the New York tracks and terminal themselves. The Harlem is not the sole owner of that property and neither the Harlem nor its lessee, the Central, is entitled to have the full value of that property included in its inventory. The ownership of the property is subject to the estates therein. The value of those estates should be deducted from the value of the tracks and terminal and assigned to the carrier. There would then be no duplication. The duplication results from the insistence of the Commission on valuing a strip of land or a terminal as a whole to one carrier. The value should be assigned to and among the several carriers having property rights therein in proportion to their respective interests. This would be in accordance with the ordinary methods of valuation in everyday use. The difficulty and inconvenience of making such a proper valuation afford no basis for refusing to enforce the Act of Congress. *Kansas City Sou. Ry. Co.* v. *Interstate Commerce Commn.*, 252 U. S. 178, 188.

This sort of property right has been valued, and been required by the courts to be valued, in numerous cases involving the valuation of public utilities, even for rate-

making purposes. *San Joaquin Co.* v. *Stanislaus County,* 233 U. S. 454; *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400.

The Commission is not authorized to report as a value for rate-making purposes under § 15a, or otherwise, a valuation which excludes part of the carrier's property.

The carrier contends that it is the duty of the Commission to ascertain and report under § 19a by application of the principles of valuation set forth therein the actual fair value of all the property of each carrier; and the value so determined of that part of its property held for and used in the service of transportation, automatically becomes the rate base of value for rate-making purposes under § 15a. The members of the Commission have been by no means unanimous in their attitude towards this question. Atlanta, B. & A. R. Co., 75 I. C. C. 645, 665, 666; Kansas City Sou. Ry. Co., 84 I. C. C. 113, 117, 125, 126.

The valuation must be susceptible of use for other purposes as well as rate-making. Subdivision (4) of § 15a was a mandate to the Commission to give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and was a warning to the Commission to give the property investment account only that consideration to which it was entitled under the law of the land. The Transportation Act gave the carriers as property owners a new interest in seeing that their individual properties were assigned their full value, especially in view of the recapture provisions, and Congress sought to emphasize to the Commission the necessity for taking into consideration all the elements of value which had long been recognized by the law of the land. The law of the land as laid down in *Smyth* v. *Ames,* 169 U. S. 466, established no special or restricted value for rate-making purposes.

Under the law of the land, specifically adopted by Congress as the test, the value for rate-making purposes is the actual fair value of all the property used in the public service, and a valuation which omits part of that property is not a proper rate base. *St. Louis & O'Fallon Ry. Co.* v. *United States,* 279 U. S. 461, 484; s. c., diss. op., Brandeis, J., p. 505.

Congress by no means intended to authorize the Commission to determine two kinds of value for the same property. It did not contemplate that the value of property can vary according to the purpose for which it is to be used. *Minnesota Rate Cases,* 230 U. S. 352, 449, 451; *Los Angeles & S. L. R. Co.* v. *United States,* 8 F. (2d) 747; rev. on another ground, 273 U. S. 299; *Kansas City Sou. Ry. Co.* v. *United States,* 19 F. (2d) 591; rev. on another ground, 275 U. S. 500. Section 19a contemplates but one valuation and that valuation is to be used for various purposes involving the individual properties of each carrier as against those of other carriers.

Valuation of incorporeal property is essential even in rate-making groups.

Mandamus is the proper remedy.

The Commission has not fully exercised its jurisdiction. *Interstate Commerce Commn.* v. *Humboldt S. S. Co.,* 224 U. S. 474, 484.

The Commission had no discretion in respect of its duty. If a statute invests a public officer with discretion as to what he shall do, mandamus does not lie to compel him to exercise that discretion in a particular way. If, however, the statute, instead of investing him with discretion to determine what he shall do, directs that he shall do certain things, his erroneous interpretation of the meaning of the statute will not protect him from a writ of mandamus commanding him to perform his duty according to the true meaning of the statute. *Roberts* v.

United States, 176 U. S. 221, 231; *Wilbur* v. *Krushnic,* 280 U. S. 306.

Mr. Justice Cardozo delivered the opinion of the Court.

The New York, New Haven & Hartford Railroad Company, and other railroad companies subject to its control, the group making up together the New York, New Haven and Hartford System, and collectively described as " the carrier," petitioned the Supreme Court of the District of Columbia for a writ of mandamus directed to the Interstate Commerce Commission and commanding the Commission to include the value of the carrier's interests in the tracks of the New York and Harlem Railroad Company from Woodlawn to Forty-third Street in the City of New York, in the Grand Central Terminal in that city, and in the land and buildings of the Boston Terminal Company, as part of the inventory and valuation required by § 19a of the Interstate Commerce Act. 37 Stat. 701, c. 92; 49 U. S. C., § 19a. The Supreme Court of the District dismissed the petition. Its judgment was reversed by the Court of Appeals, 60 App. D. C. 403; 55 F. (2d) 1028, and a writ of certiorari brings the case here.

The carrier operates lines of railroad in Massachusetts, Rhode Island, Connecticut and New York. Its tracks enter the state of New York at or near Port Chester, and at Woodlawn connect with the tracks of the New York and Harlem Railroad Company, now operated under lease by the New York Central System. From Woodlawn south to the Grand Central Station, a distance of about twelve miles, the carrier's passenger trains run over the Harlem tracks; and the carrier and the Central use the station in common. At Boston, Massachusetts, the carrier's tracks connect with those of the Boston Terminal Company, the owner of the South Station in Boston; and

the carrier has the use of that station in common with other lines. The facts bearing upon its interest in the Harlem tracks and the Grand Central Terminal will be considered first, and afterwards those bearing upon its interest in the terminal at Boston.

On March 17, 1848, an "agreement and contract of transportation" was entered into between the New York and Harlem Railroad Company and the New York and New Haven, a predecessor of the carrier. By this contract, the Harlem granted to the New Haven the right "to run their trains, engines and cars for the transportation of passengers, mails, expresses, freight, etc., over the track or tracks of the road of the New York and Harlaem Railroad Company from the point of junction aforesaid to and into the city of New York." The New Haven was to furnish its own haulage and to pay the Harlem "as full compensation for the use and occupation of their track or tracks as aforesaid, a certain sum for each passenger transported," and a portion of the tariff rates received for the transportation of express matter and the mails. Compensation was to be adjusted every five years by agreement, or in the event of failure to agree, by arbitration. Following the execution of this contract, and on March 29, 1848, the legislature of New York passed an act to amend the charter of the New York and Harlem Railroad Company. In § 6 of that act, it confirmed the validity of the contract with the carrier's predecessor. "The New York and New Haven Railroad Company is hereby authorized to enter upon and run their cars and engines for passengers, freights, mails, expresses and other business, over the road of the New York and Harlem Railroad Company, from the point of junction of the roads of said companies at or near William's Bridge, in the County of Westchester, to the City of New York, and as far into the said city as the said Harlem Railroad may extend, upon such terms, and to such point as has been or may

hereafter be agreed upon by and between said companies, a copy of such agreement or agreements to be duly authenticated and filed in the office of the Secretary of State of this state." Promptly upon the enactment of this statute, the New Haven connected its line with the tracks of the Harlem, and ever since that time has run its trains over them into the City of New York. The Harlem on April 1, 1872, leased its road to the New York Central for a term of 401 years, the lease reciting that it was subject to the contract between the Harlem and the New Haven.

From a statement of the facts as to the carrier's interest in the tracks south of Woodlawn we pass to a consideration of its interest in the Grand Central Terminal. An agreement described as a "tripartite lease" was entered into on November 1, 1872, between the Harlem, the Central and the New Haven whereby the Harlem leased to the other roads the use of certain parts of the Grand Central Depot (a building since then destroyed) and the adjacent yards. On July 24, 1907, this agreement was superseded by another tripartite lease between the same parties. The Central agreed at its sole expense to acquire the lands and make all the changes necessary for the construction of a new station, the present Grand Central Terminal. Acting for itself and the Harlem, it leased to the New Haven during the term of the New Haven's charter (*i. e.*, in perpetuity) the "use, in common with the Central Company, subject to all the provisions of this agreement, of the said Railroad Terminal for the accommodation of the traffic of the New Haven Company, other than freight traffic," with the proviso that the New Haven's right to the use of the terminal should in no event exceed fifty per cent of the maximum capacity. As "compensation for the premises hereby demised," the New Haven was to pay to the Central that proportion of four and one-quarter per cent interest on the cost of construction and of the annual expenses for

maintenance and operation "which the use of the Railroad Terminal by the New Haven Company bears to the entire use thereof." The terminal was to be under the direction of a terminal manager appointed by the presidents of the Central and New Haven Companies and removable by either.

Next in order is a statement of the interest of the carrier in the terminal at Boston. By an act of the Massachusetts legislature, approved June 9, 1896, the Boston Terminal Company was incorporated "with power to construct and maintain a union passenger station in the southerly part of the City of Boston, and to provide and operate adequate terminal facilities for the five railroad companies entering the city and for the accommodation of the public." These railroad companies, including the New Haven, were severally authorized to subscribe for the capital stock in equal amounts. Upon the completion of the proposed improvements, the five railroads were to use the station and its terminal facilities for all their terminal passenger business in Boston, and were to pay to the Terminal Company the amounts necessary to satisfy the expenses of the corporate administration and of the maintenance and operation of the station and other facilities, together with interest on the bonds and a dividend not to exceed four per cent on the capital stock. The payments by the several roads were to be proportioned to the use, and were to be deemed to be a part of their operating expenses. At the time of the trial, the New Haven, having succeeded to the interests of some of the other roads, held in its ownership or subject to its control eighty per cent of the Terminal stock, the remaining twenty per cent being controlled by the Central.

With this statement of the facts as to the carrier's interests in the tracks and terminals, we reach the question whether the Commission was under a clear duty, enforce-

able by mandamus, to include those interests with a specific valuation in the statutory inventory.

By § 19a of the Interstate Commerce Act (49 U. S. Code; Act of March 1, 1913, c. 92, 37 Stat. 401, as amended), there is laid upon the Commission the colossal task of preparing an inventory and valuation of the property of the railroads of the United States.[1]

Subdivision *a* of the section is sweeping in its extension. "The Commission shall . . . investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this act." It "shall make an inventory which shall list the property . . . in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission."

Subdivision *b* contains directions as to the method of showing values and thus fulfils the promise of subdivision *a* that such directions as to form will be "hereinafter provided."

The provisions are distributed into five classes.

Under the heading "first," there is a command to the Commission to "ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained and the reason for their differences, if any."

For convenience of reference this part of the directions that are grouped under the heading "first" will be described as number one.

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[1] The events leading up to the adoption of the act and the public policy it was designed to further will be found clearly stated in Sharfman, The Interstate Commerce Commission, vol. 1, pp. 117 to 137.

Under the same heading there is, however, another part which will be identified as number two.

"The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values."

The division described as "second" contains directions for a report of the original cost and present value of lands, rights of way and terminals separately from improvements.

The "third" division deals with the valuation of property held for purposes other than those of a common carrier; the "fourth" with the financial history and corporate structure of the carriers; and the "fifth" with the ascertainment and valuation of governmental aids or gifts.

By subdivision *c* the Commission is empowered, except as otherwise provided, "to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value."

The Commission at an early stage in its labors was confronted with the problem as to the proper method of valuation where there was a division of interest between the ownership and the use. The first exposition of its views upon that subject will be found in a decision made July 31, 1918, in the matter of the valuation of the Texas Midland Railroad, 75 I. C. C. 1, 20, 121, 122. The substance of its ruling there was that where property is jointly used by two owners, the details will appear in the inventory of each; that where property is owned by one carrier, and exclusively used by another, the details will appear in the inventory of the owner, but in addition

the value will be shown in the inventory of the user; that where a carrier owns and uses property but gives to some other carrier not the exclusive use but only a qualified use in common with itself, such as the right to use its tracks, the fact and nature of the use will be described in the inventory of both the owner and the user, but the value of the property will be reported in the inventory of the owner solely. "The physical property," said the Commission (p. 124), "is not changed by this dual use." "The law requires the ascertainment of values for property owned or used, but not the value of the use." 75 I. C. C. 24. Despite the comprehensive command to report the value of all the property owned or used by any common carrier subject to the act, there is still, so the Commission held, some latitude of judgment as to the extent to which the component elements of worth are to be separated, and a specific valuation allocated to each.

The Commission has steadfastly adhered to these principles in the fulfilment of its task. Along the lines there charted, a thousand inventories and reports have been made, it is said, during the nineteen years that have gone by since the Valuation Act was passed. Cf. Report of the I. C. C. for 1931, p. 68. In only one instance, except this, has the method, so far as we are informed, been challenged in the courts as a departure from the statute, and there mandamus was refused. *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commn.*, 6 F. (2d) 692. Cf. Matter of Kansas City Southern Ry. Co., 75 I. C. C. 223, 234. What was done in this inventory has at least that sanction of validity which is born of long administrative practice. *United States* v. *Moore*, 95 U. S. 760, 763; *Logan* v. *Davis*, 233 U. S. 613, 627; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378. In conformity with that practice the Commission overruled the protest of the

carrier, and held that the trackage rights over the Harlem roadbed and the rights of user in the New York and Boston terminals would be reported in the inventory as valuable rights or interests belonging to the carrier, but without assigning to them a specific value separate from the value given to the system as a whole. Like "going concern value" and that of many other intangibles, the value of these qualified privileges of user, falling short of ownership or full possession of the physical thing, was not excluded altogether as an element to be reflected in the ultimate appraisal. Cf. Texas Midland R. R. Case, 75 I. C. C. 1, 69. What was held was no more than this, that the contribution of such factors was not a separate thing of value to be segregated from all the other values inhering in a unified system of railroad operation, and ticketed by itself. "We report all the costs which are specifically named in the valuation act, on which we can obtain tangible data, and we find a single sum value after a consideration of those tangible costs and the intangible elements of value which inhere in a fully organized and operating property." Cf. *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 165; *McCardle* v. *Indianapolis Co.,* 272 U. S. 400, 414. These are the words of the Commission in answering the carrier's objection that the going concern value had not been separately stated. Its answer might have been the same if it had been meeting the objection that privileges of user, incapable of appraisal in terms of the cost of the thing used, had been described in the inventory without specific appraisal of the value of the use.

We are thus remitted to the question whether this method of classification, accredited to us, as it is, with all the authority springing from administrative practice, is a departure from any duty created by the statute, or, more accurately, from any duty so peremptory and unmistakable as to be enforceable by mandamus. True indeed it

is that by the express direction of the statute there is to be a valuation of all the property owned or used by any carrier subject to the act. We do not travel very far upon the road to a solution of our problem by repeating that command. A valuation there is to be, for so it is commanded in subdivision *a*, but only "as hereinafter provided," and to discover what is "hereinafter provided," we must look to subdivision *b*. If there is nothing in subdivision *b* calling for the separate classification and appraisal of the value of a right to use, then the duty so to classify and appraise is not created by the statute, and certainly not created in any clear and peremptory way.

We must distinguish between the ultimate result to be attained by the preparation of the inventory and the details of form and method prescribed for its attainment. To admit that there must be a valuation of the whole is not equivalent to admitting that a separate and specific valuation must be allocated to every kind of property interest embraced within the whole. To what extent a group of interests shall be resolved into its elements is thus a question of degree. If a barren literalism were to guide us, subdivision could be carried down to the dimensions of an atom. We are not to push the mandate to "a drily logical extreme." *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110. A roadbed and a terminal are property, but so are license privileges, and contracts for supplies, and rights *in personam* as well as those attaching to a *res*. Was it the meaning of the lawmakers that rights and interests such as these were to have a value specifically assigned to them apart from their relation to the "going value" of the business? Not even counsel for the carrier would have us go so far. By concession there are forms of property which are to be considered by the Commission as contributions to a larger whole, and not as things apart. We were told upon the argument that the interests in the Harlem tracks might have been omitted from the inven-

tory if they had been licenses, and nothing more. Specific valuation became necessary because, in the view of counsel, the interests had their basis in a franchise or an easement. A like distinction was drawn in respect of the interests in the terminals. They might have been omitted from the inventory, however great their value, if the privilege of use had been derived from a contract giving rise to a mere license. The omission of a specific valuation became wrongful, it was argued, if the interests amounted to a title or estate. The Commission declined to go into these niceties. "It is . . . not necessary for us to determine whether the right of use in the carrier is best defined by reference to it as a license to use, an easement or a trackage right." We shall practise a like restraint, observing only in passing that the proper classification is obscure (*Union Pacific Ry. Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 163 U. S. 564, 582, 583; *Union Pacific R. Co.* v. *Mason City & Ft. Dodge R. Co.*, 222 U. S. 237, 247, 248), and that the carrier by its own conduct has admitted the obscurity. In its annual reports to the Commission, starting in 1888 and including the year preceding the beginning of this suit, its interests in the Harlem tracks and in the New York and Boston terminals are reported under "class 5," which is described in the report as including "all tracks operated and maintained by others, but over which the respondent has the right to operate some or all of its trains. In roads of this class, the respondent has no proprietary rights, but only the rights of a licensee." What concerns us at the moment, however, is not the fitness or the unfitness of one classification or another. What matters for present purposes is the carrier's concession that the command to prepare an inventory in which all the property shall be valued does not mean that every property interest shall be separately valued. Something, then, is to be abated from the dictates of an implacable literalism allowing no exceptions.

At one point or another a line of division has to be drawn between the property to go in and the property to stay out. The location of the line will involve considerations of legislative intention and administrative judgment. Division being necessary, did the members of the Commission ignore a plain and certain duty in making it where they did?

In our summary of the statute, the provisions under the heading "first" of subdivision *b* were separated into two parts, described as numbers one and two. Part number one was intended to procure the valuation of a railroad considered as a physical thing. Every "piece of property" is to be inventoried, and with reference to every "piece" so inventoried the Commission is to ascertain the investment in the thing, and the cost of producing it anew. The factors have been made familiar by historic litigations. *Smyth* v. *Ames,* 169 U. S. 466; *St. Louis & O'Fallon Ry. Co.* v. *United States,* 279 U. S. 461. But the statute does not mean that there shall be a duty to appraise in terms of cost if the interest to be appraised is such that the cost of the thing is without relevance as a criterion of the value of the interest. There can be no plain and certain duty, enforceable by mandamus to proceed to a valuation that will be a snare or a deception. Here the New Haven has not invested anything in the roadbed or the terminals. It is not affected for good or ill by fluctuations in the cost of building them anew. Whatever the legal category in which its interests are to be placed, the value is independent of the cost of the thing in which those interests inhere. Plainly untenable is its contention that the amount to be allowed to it is the proportion of the cost value of the property that would result from a division of such value between itself and the Central in the ratio of use. 30 I. C. C. Val. Rep. 1 at pp. 31, 33. Such a method of appraisal ignores the millions of dollars payable year by year in perpetuity to keep

the privilege alive. It treats as an investment what is merely a contingent debt. The value of the trackage rights, whether one views them as amounting to a license or an easement, is not the cost of the roadbed, but the difference between the value of the use and the rent to be paid therefor. The value of the interests in the terminals, whatever the proper name for them, must be measured in the same way. Today, under the Transportation Act of 1920, the Commission may compel a carrier owning terminal facilities to grant to other carriers the use of such facilities, including main line tracks for a reasonable distance, in return for a compensation prescribed as just and reasonable. 49 U. S. Code 3 (4). For all that appears the rights now in controversy might continue to be enjoyed though the agreements set forth in the record were to be rescinded or annulled, and enjoyed at a smaller cost, if a rental lower than the existing one were to be fixed by the Commission. Be that as it may, the value for the New Haven is not the value of the thing or piece of property owned or used, or of any fractional interest therein. The value for the New Haven is the value of the use, which is measured by the difference between the rent payable under the lease and the fair and reasonable rent that would be the compensation payable to the owner in the absence of agreement. There is nothing to indicate that the carrier laid testimony before the Commission as to what this difference would be. Cf. Texas Midland Railroad Case, 75 I. C. C. 1, 24. It took its stand upon the position that *pro tanto,* in proportion to its use, it was the owner of the fee.

The argument will be made, however, that the Commission is inconsistent. Appraisal on the basis of cost has been thought to be suitable where the lessee has a possession exclusive of the owner. Why, then, is it not suitable also where the interest of the lessee is in common with the owner, and this though the interest fluctuates from

day to day with the measure of the use? No doubt the practice of the Commission has been what the argument assumes. The practice has been, as we have already pointed out, when the possession of a lessee is exclusive of the possession of the owner, to inventory leased property in the name of each of them, setting down for each the original and the reproduction cost of the subject matter of the lease, setting down the fact of use, and making allowance thereafter for any increase or deduction due by reason of such use when costs are readjusted and corrected to express the final values.[2] Never upon the face of the inventory has there been a specific valuation of the interest of the lessor and that of the lessee considered as estates in the land and structures and apart from the valuation of the property demised. The Commission has been unfaltering in its adherence to the principle that the value to be reported is the value of the thing, and not of every interest connected with the thing. Whenever the nature of a lease is such that the cost of what is leased may appropriately be taken as an index of the value of the leasehold, the inventory and the valuation have been made upon that basis. Whenever the interest has been such that cost is not an index, the test of cost has been rejected. In the application of these methods there has been no discrimination between this carrier and others. In the inventory now in controversy there are properties owned by the New Haven, and wholly leased to other lines, and properties owned by other lines, and wholly leased to the New Haven. For all these properties the reproduction cost is set forth in the inventory of the New Haven System without specific appraisal of the value of the reversion as an interest subject to the lease, or the value of the lease as an interest distinct from the rever-

[2] The practice is explained by Mr. Esch, formerly Valuation Analyst of the Commission, in an article "Valuation of Leased Railroad Property." 33 Yale L. J. 272, 276, 277.

sion. The New Haven itself is thus the beneficiary of the principle that the inventory is to set forth the value of the thing, and not of every interest touching the enjoyment of the thing.

We recur, then, to the question why the method of appraisal that has been thought to be appropriate where a lessee has the sole use may not be followed here also where in common with the owner the lessee has an undivided interest in the use of tracks and terminals in return for yearly payments. Perhaps a sufficient answer is that it is never mandatory on the Commission to value the interest of any lessee on the basis of the cost, though such a method may in certain circumstances be appropriate as an exercise of discretion. But other answers are available, if this be thought inadequate. There can be no doubt that even in its application to a sole lessee, the method of valuing a lease on the basis of the cost of the property demised is at best a rough and ready approximation. Even so, the formation of a rate base by treating a lessee as owner and measuring a fair return of income as a percentage of the cost may yield a reasonable average of accuracy where the interest of the lessee is constant and the rentals that it pays are excluded from the computation of its operating expenses. Such exclusion is required by the accounting rules of the Commission where the lessee has the sole use. The practice is different, however, where a carrier has the benefit of joint-facilities. There the rentals paid for the use of the facilities are part of the operating expenses, and were so treated in the case at hand. This treatment of them has the support of statute (Transportation Act, 1920; 49 U. S. C., § 15a [1])[3] as well as of administrative practice. A car-

[3] "The term 'net railway operating income' means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents."

There is a like direction in the act incorporating the Boston terminal.

rier receives a duplication of benefits if it is permitted to include its rentals as an operating expense while earning a return upon the value of an unincumbered fee.[4] Aside from this objection, a lease which gives to the lessee, not exclusive possession of the property demised, nor even a fixed share, but a share fluctuating from time to time with the variations of the business, is too uncertain and inconstant to be valued with even approximate correctness by the test of the cost of the property subjected to the use. The Commission was satisfied to adopt the formula of cost where the lease was such as to lead it to believe that the margin of error would not be inordinately large.[5] Nothing in the statute makes it mandatory to apply the same formula, inaccurate at best, to leases of a different nature if the margin of error would thereby be increased.[6] Nor is there anything in the objection that by force of § 15a of the Transportation Act, 1920, a form of inventory permissible under § 19a of the Valuation Act of 1913 is permissible no longer. The Act of 1920

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[4] Esch, Leased Railroad Property, *supra*, at p. 274.

[5] "Not only is the matter of proportion of use at any particular moment largely speculative, but it varies from time to time." Esch, *supra*, at pp. 278, 279.

[6] Upon a hearing before the Senate Committee, Senator La Follette, the Chairman, inquired of a witness, Prof. Commons, as to the proper method of valuation where property was leased. The answer was in substance that such a case might be taken care of in either one of two ways, by valuing the property as if it were owned by the lessee or by making allowance for the rent as an operating expense, and that it would be the function of the Commission to determine the preferable method in any given situation. The members of the Committee apparently acquiesced. Senator La Follette adverted to the possibility of a double valuation if one railroad had the privilege of running its trains over the tracks of another, and added that, of course, only one valuation would be proper. Physical Valuation of Property of Common Carriers, Senate Committee on Interstate Commerce, 62nd Congress, 3rd Session, Senate Library, Vol. 15, No. 6, pp. 128 and 129.

authorizes the Commission to "utilize the results of its investigation under § 19a" of the Interstate Commerce Act for certain additional purposes "in so far as deemed by it available." 49 U. S. Code, § 15a (4). There is nothing in the new statute to suggest that earlier inventories are to be revised, or that forms of valuation lawful in the past are to be unlawful in the future.

What has been written serves, we think, to show that the interests in controversy are not affected by that part of subdivision *b* of the statute which we have identified as number one. The question remains whether a specific valuation is made mandatory by the provisions of the part identified as number two. "The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier and an analysis of the methods employed, and of the reasons for any differences between any such value and each of the foregoing cost values." The carrier did not build its case on that command in making proof to the Commission. It took the position, on the contrary, that it was an owner of the roadbed and the terminals in proportion to its use and made its proof accordingly. See Matter of New York, New Haven & Hartford R. Co., 30 Val. Rep. I. C. C. 1, 31, 32, 33. There can surely have been no breach by the Commission of an inflexible and certain duty in omitting from an inventory a separate and specific estimate of the difference between the value of the use and the rents reserved to the lessors when the protest of the carrier was silent as to what the valuation ought to be. The result will be the same, however, though this defect be overlooked. The command to report other elements of value does not impose a duty, inflexible and certain, to appraise the value of a use which is unrelated to the value of what is subject to the use. The ends to be attained are differ-

ent. They can be gathered from a report of the Senate Committee on Interstate Commerce submitted to the Senate in February, 1913. 62nd Congress, 3rd Session, No. 1290, p. 8. The report begins with a consideration of the three criteria of value that are stated in part one of subdivision *b*: first, original cost; second, cost of reproduction new; third, cost of reproduction, less depreciation. From these it passes to a consideration of the effect and purpose of part two, prefacing the discussion with the title " other values and elements of value; that is, intangible values." " This classification," the report continues, " provides for going value, good will value, and franchise value. Whether any or all of these values will be considered by the Commission or the courts in determining the fair value of the property, and if so, what importance shall attach to them is a matter for the Commission and the courts. Especially as to intangible values, the Commission and the courts are in a transition period. The elements of value which will finally constitute fair value for rate-making purposes are steadily narrowing. They are not expanding. No decision by Commission or court will stand which is ultimately found to be unfair to the public or to the common carrier. The committee has, it is believed, provided for ascertaining every element of value which, upon recognized authority, should be considered." Congress had no thought to tie the hands of the Commission by imposing a peremptory duty to classify in any particular way the factors supplementing or modifying the significance of cost, and to allocate to each a specific value. The report makes it clear that Congress did not know what those factors were, and that the Commission, guided by the courts, was to work out in its own way a practical and fair result. Whatever duty was imposed had its basis in a general admonition which left a wide and indefinite margin of judgment as to the method of obedience.

In the light of these considerations, the aim of the statute in bidding heed to be given to other elements of value than those of cost alone, is readily discerned. Its aim is to afford play for the correction of the errors certain to result where the value of a railroad is identified with the cost of its component parts without reference to the values generated or extinguished by the union of the parts into a single and organic whole. Effects that are the resultant of two or more forces working in combination may be capable of appraisal when it would be difficult, if not impossible, to estimate the consequences of any one of the forces operating singly. For an illustration of this truth we have only to bear in mind the obscure and varied factors, psychical as well as physical, that enter into the creation of the "going value" of a business. Not infrequently the value of these intangibles will be an aggregate made up of elements too deeply interpenetrated for any specific figure to be set opposite to one of them dissevered from the others. What is true of "going value" is true of roadbeds and stations, of trackage rights and rights in terminals. As soon as one passes beyond an appraisal of the cost, the increments or the deductions involve estimates of relation, the parts being worthless or nearly so unless adapted to the whole. Not a mile of track would be worth the cost of reproducing it, nor a trackage right the rental, if there were not stations at either end. Not a station would be worth the cost of building it anew if there were not roadbeds or tracks or trackage rights beyond. The final value set down in the report of the Commission shows that over and above the cost of reproduction less depreciation, something has been added, in appraising the property of the carrier, to express the value of the whole as distinguished from the total of the parts. Not even the depreciated reproduction cost, let alone something in addition, would

have been reported as the final value if the road had been viewed as a congeries of fragments. To argue that the Commission ignored these intangibles altogether because it failed to value them specifically is to miss the significance of the whole process of appraisal. Every trackage contract and every terminal use, in so far as it contributes to the unity of the system, is reflected in the final value ascribed to the physical things that are listed in the inventory. The Harlem trackage contract is there reflected, for the reproduction cost would cease to be a measure of the value if the trains stopped short at Woodlawn. The rights in the New York and Boston terminals are there, for again the reproduction cost would be of no avail as a criterion if there were no terminal facilities for passengers at Boston or New York. The question is not whether trackage rights and rights in terminals are interests that the Commission is at liberty to treat as nonexistent. The question is whether they are interests of such a kind that they must be specifically valued instead of being viewed as factors that enter by infusion into the lifeblood of the organism. If there is anything in the statute requiring values of that order to be separately stated, the carrier has not pointed to it. In the absence of such a duty, nothing in the report of valuation justifies a holding that any property interest was excluded altogether. "We have given careful consideration," said the Commission, "to all facts of record and pertaining to the value of the common-carrier property of the carrier as an organized, developed, well-maintained, seasoned property in operation as a going concern." Many diverse elements, reacting one upon another, have been fused in an act of judgment drawing its sustenance from all.

A word may yet be due with reference to those provisions of subdivision *b* of the statute which are set forth

under the heading "second." "Such investigation and report," it is there said, "shall state in detail and separately from improvements the original cost of all lands, rights of way and terminals owned or used for the purposes of a common carrier and ascertained as of the time of dedication to public use, and the present value of the same." The rights of way there in view are those that involve an investment of the moneys of the carrier, and result in the possession of the land itself, the roadbed on which the tracks are laid. *Georgia* v. *Cincinnati Southern Ry. Co.*, 248 U. S. 26, 28. They do not include the privilege of hauling cars for a rental over the roadbed of another. What is true of rights of way is true also of terminals. If the New Haven has no interest in the improvements constituting the roadbed and the terminal stations sufficient to require a specific valuation of its interests under parts one and two of subdivision "first," it has none sufficient to require such valuation under subdivision "second."

We do not go beyond the necessities of the case before us in shaping our decision. Whether an inventory such as this one, omitting a specific valuation of important rights and interests, gives full or adequate effect to the intention of the lawmakers, we are not required to determine. In later or collateral controversies that question may be pertinent. For the purpose of this case, it is enough to hold, as we do, that the duty of specific valuation, if it exists, has been imposed upon the Commission too vaguely and obscurely to be enforced by a mandamus. *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636; *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206. One cannot rise from a study of the statute in the setting of its history and of the administrative practice under it and hold at the end an assured belief that the Commission has been commanded by the Congress to do the act omit-

ted. Where a duty is not plainly prescribed, but is to be gathered by doubtful inference from statutes of uncertain meaning, "it is regarded as involving the character of judgment or discretion," (*Wilbur* v. *United States ex rel. Kadrie, supra*), and mandamus is thereby excluded. The case at hand differs in essentials from *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commn.*, 252 U. S. 178, where a specific, unequivocal command, removed after the decision by an amendment of the statute,[7] was laid upon the Commission to value a particular thing, and the Commission ignored the command to the extent of refusing to hear any evidence whatever. The ruling in that suit has been explained in later cases, and confined to its peculiar facts. *Interstate Commerce Commission* v. *Waste Merchants Association*, 260 U. S. 32, 35; *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 311.

Public policy forbids that the work of the Commission in the fulfilment of the stupendous task of valuation shall be hampered by writs of mandamus except where the departure from the statute is clear beyond debate. The report is not a stage in a judicial proceeding affecting this carrier or others. "It is the exercise solely of the function of investigation." *United States* v. *Los Angeles & Salt Lake R. Co., supra*, p. 310. The final valuations made in it will indeed be *prima facie* evidence against the carrier in proceedings under the Commerce Act. 49 U. S. C. § 19a (1). Even so, the opportunity to contest them, if at any time they are introduced in evidence, is "fully preserved to the carrier, and any error therein may be corrected at the trial." *United States* v. *Los Angeles & Salt Lake R. Co., supra*, p. 313. The valuation of the railroads of the country has been ordered by the Congress in

[7] See Act of June 7, 1922, c. 210, 42 Stat. 624.

the belief that this new "Domesday Book" will promote an important public purpose. Nearly twenty years have passed since that belief found expression in the enactment of the statute, and the work is still unfinished. Report of the I. C. C. for 1931, p. 68. In the meantime the enactment of § 15a of the Transportation Act of 1920 has made the need for valuation more imperative than ever. 49 U. S. C., § 15a. In any work so vast and intricate, what is to be looked for is not absolute accuracy, but an accuracy that will mark an advance upon previous uncertainty. If every doubt as to the extent and form of valuation is to be dispelled by mandamus, the achievement of the ends of Congress, already long deferred, will be put off till the Greek Kalends.

The judgment of the Court of Appeals of the District of Columbia is reversed, and the judgment of the Supreme Court dismissing the petition affirmed.

Reversed.

Mr. Justice Van Devanter, Mr. Justice McReynolds and Mr. Justice Sutherland are unable to concur in this decision. But, as the decision is put distinctly on the ground that the specific duty sought to be enforced by mandamus is not so definitely and plainly described by the statute as to justify the application of that remedy, and the question whether the inventory in controversy, omitting a specific valuation of important rights and interests, gives full or adequate effect to the intent of the statute, is not determined but distinctly reserved for future contestations, they deem it sufficient to say at this time that they regard the reasons assigned by the Court of Appeals for its judgment as sound and requiring an affirmance of its judgment.

The Chief Justice and Mr. Justice Butler took no part in the consideration and decision of this case.

SGRO *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 55. Argued October 10, 1932.—Decided December 5, 1932.

1. The provisions of the Fourth Amendment relative to search warrants, and of legislation regulating that process, should be liberally construed in favor of the individual. P. 210.
2. Under § 25 of the National Prohibition Act and the provisions of the Act of June 15, 1917 (Espionage Act), to which that section refers, a warrant to search for intoxicating liquor becomes void at the expiration of ten days from the date of its issuance and can not then be revived by the magistrate merely by redating and reissuing it solely on the basis of the affidavit upon which it was issued originally. Pp. 210, *et seq.*
3. The issue of a new warrant is a new proceeding and must be supported by proof that probable cause then exists. P. 211.

54 F. (2d) 1083, reversed.

CERTIORARI, 286 U. S. 539, to review the affirmance of a judgment on conviction under the Prohibition Act. Evidence seized under a search warrant was used against the defendant at the trial after a petition for its return to him, on the ground that the search was illegal, had been made and overruled.

Mr. Irving K. Baxter for petitioner.

The ruling that, after the lapse of ten days without its execution, the commissioner may by changing the date extend the search warrant, is in direct conflict with the Act of June 15, 1917, c. 30, Title XI, § 11, 40 Stat. 229. This would be substantially to repeal the statute.

Since there was no proof of probable cause before the commissioner at the time, such redating or reissuing is in direct violation of the Fourth Amendment.

A search warrant is the most drastic weapon known to the law. Strict compliance with the Constitution and

statutes respecting search warrants, is necessary, to safeguard the rights of citizenship.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. John J. Byrne* and *W. Marvin Smith* were on the brief, for the United States.

The act of the Commissioner in changing the date and reissuing the warrant was, in effect, the issuance of a new warrant.

The only doubt that can arise respecting the validity of the new warrant would be whether probable cause had ceased to exist because twenty-one days elapsed between the issuance of the old and the new.

This question is unaffected by the requirement of § 11 of the Espionage Act that the warrant must be executed within ten days after its issue. This was obviously designed to prevent undue delay in the execution of the warrant and to require, after the expiration of the statutory period, a new warrant based upon a new finding by a judge or commissioner that probable cause then existed in order to justify a search. But it has been often held, in effect, that Congress did not intend by this provision to prescribe ten days as the maximum period during which the condition shown by the affidavit as justifying a search could be presumed to continue. *United States* v. *McKay,* 2 F. (2d) 257; *United States* v. *Fitzmaurice,* 45 F. (2d) 133; *United States* v. *Callahan,* 17 F. (2d) 937; *Hawker* v. *Queck,* 1 F. (2d) 77, cert. den., 266 U. S. 621; *Hefferman* v. *United States,* 50 F. (2d) 554; *Dandrea* v. *United States,* 7 F. (2d) 861.

In the case at bar, the affidavit alleged the purchase of beer in a hotel from the person in charge on June 29, 1926. Assuming that this showed probable cause for belief that intoxicating liquor was possessed on the premises on July 6, 1926, when the original warrant issued, we submit that it would not be unreasonable to infer that liquor was pos-

sessed there three weeks later, when the new warrant issued.

The affidavit sufficed to show probable cause.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The petitioner was charged with violating the National Prohibition Act by possessing and selling intoxicating liquor at the Bouckville Hotel. The District Court denied his request to restrain the use of evidence procured by federal officers while searching the hotel under a warrant alleged to be invalid. This evidence was introduced at the trial over his objection. He was found guilty and the judgment against him was affirmed by the Circuit Court of Appeals. [54 F. (2d) 1083.] This Court granted certiorari. The only question presented is as to the validity of the warrant.

Subject to petitioner's contention, the parties entered into a stipulation of facts which so far as pertinent to the question is as follows:

"That on or about the sixth day of July, 1926, William Arthur, United States Commissioner, at Rome, New York, issued a search warrant based upon an affidavit introduced in evidence in this case, of C. G. Dodd, in which Dodd swore that he made a purchase of beer of the defendant; that on the twenty-seventh day of July, 1926, the said search warrant not having been executed in the interim and ten days from the date of the search warrant having expired, the search warrant was taken by the prohibition agents to whom it was directed back to the commissioner and by him, or by someone in his office under his direction and control, the date of the search warrant was changed from July sixth to July twenty-seventh, 1926, and thus reissued; that acting under the color of such search warrant," the search in question was made.

The record also contains a certificate by the United States Commissioner, under date of December 20, 1926, as follows:

"I hereby certify that the complaint or affidavit, upon which the search warrant was issued in the above entitled matter, was made before me on the 6th day of July, 1926. That the search warrant was issued on or about said 6th day of July, 1926, but was not executed within the ten days prescribed by statute, and was returned to me by Albert Vandiver, Prohibition Agent in Charge of the Syracuse office requesting that same be reissued or re-dated, and my docket book shows that same was reissued on the 27th day of July, 1926, and mailed back to said Vandiver."

The National Prohibition Act, § 25, 41 Stat. 305, 315, U. S. C., Tit. 27, § 39, authorizes the issue of warrants to search for intoxicating liquors as provided in Title XI of the Act of June 15, 1917, 40 Stat. 228.[1] Section 11 of the last mentioned Act has the following requirement:

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[1] The following are among the provisions of the Act of June 15, 1917, Tit. XI, 40 Stat. 228:

"Sec. 3. A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

"Sec. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

"Sec. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

"Sec. 6. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the

"SEC. 11. A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void."

As the original warrant was issued on July sixth and was not executed within ten days, it became void under this explicit provision. But the Government contends that the warrant could be redated and reissued, and that in this form it should be regarded as a new warrant under which the search could lawfully be made.

With this argument we cannot agree. The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual. *Boyd* v. *United States,* 116 U. S. 616, 635; *Byars* v. *United States,* 273 U. S. 28, 32; *Marron* v. *United States,* 275 U. S. 192, 196, 197; *United States* v. *Lefkowitz,* 285 U. S. 452, 464. The statute requires that the judge or commissioner issuing a search warrant for intoxicating liquors must be satisfied "of the existence of the grounds of the application or that there is probable cause to believe their existence." Act of June 15, 1917, Tit. XI, § 6. He must take proof to that end. *Id.,* §§ 4, 5. The warrant must state "the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof." *Id.,* § 6. While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test

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names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

must be determined by the circumstances of each case. It is in the light of the requirement that probable cause must properly appear when the warrant issues that we must read the provision which in explicit terms makes a warrant void unless executed within ten days after its date. That period marks the permitted duration of the proceeding in which the warrant is issued. There is no provision which authorizes the commissioner to extend its life or to revive it.

The issue of a second warrant is essentially a new proceeding which must have adequate support. The fact that it is a second warrant gives the commissioner no privilege to dispense with the statutory conditions. These cannot be escaped by describing the action as a reissue. If the warrant is the old one, sought to be revived, the proceeding is a nullity, and if it is a new warrant, the commissioner must act accordingly. The statute in terms requires him before issuing the warrant to take proof of probable cause. This he must do by examining on oath the complainant and his witness and requiring their affidavits or depositions. The proof supplied must have appropriate relation to the application for the new warrant and must speak as of the time of the issue of that warrant. The commissioner has no authority to rely on affidavits which have sole relation to a different time and have not been brought down to date or supplemented so that they can be deemed to disclose grounds existing when the new warrant is issued. The new warrant must rest upon a proper finding and statement by the commissioner that probable cause then exists. That determination, as of that time, cannot be left to mere inference or conjecture. The purpose of the statute would be thwarted if by the simple expedient of redating, without more, the time for the execution of a warrant could be extended.

Applying these principles to the instant case, the warrant cannot be sustained. The proceeding for the warrant issued on July sixth had terminated and that warrant was dead. On the new application of July twenty-seventh the commissioner took no proof to show that probable cause then existed and he made no finding of probable cause at that time. It is impossible by any process of reasoning to obscure or alter what he actually did. He simply changed the date of the old warrant and it was "thus reissued." Such action was unauthorized.

Judgment reversed.

Mr. Justice Stone and Mr. Justice Cardozo think that the Commissioner, by redating the warrant, in effect, issued a new warrant, which was adequately supported by facts disclosed in the affidavit, then before him, on which the first warrant had been issued.

Separate opinion of Mr. Justice McReynolds.

I concur in the conclusion that the judgment below should be reversed.

An information charged that Petitioner Sgro had violated the National Prohibition Act by keeping intoxicating liquor at an hotel. In due time and manner he unsuccessfully asked the District Court to prohibit the use of all evidence procured by federal officers while searching the hotel under color of a warrant alleged to be invalid. At the trial this evidence was introduced over his objection. A verdict of guilty followed; judgment thereon was affirmed by the Circuit Court of Appeals. If the challenged search warrant was invalid, this judgment must be reversed.

By stipulation it appears—

"That on or about the sixth day of July, 1926, William Arthur, United States Commissioner, at Rome, New York, issued a search warrant based upon an affidavit introduced in evidence in this case, of C. G. Dodd, in which Dodd

swore that he made a purchase of beer of the defendant; that on the twenty-seventh day of July, 1926, the said search warrant not having been executed in the interim and ten days from the date of the search warrant having expired, the search warrant was taken by the prohibition agents to whom it was directed back to the commissioner and by him, or by someone in his office under his direction and control, the date of the search warrant was changed from July sixth to July twenty-seventh, 1926, and thus reissued; that acting under the color of such search warrant, Prohibition Agents Henry E. March, Bernard J. Dwyer and B. G. Silvernail went to the premises described in the search warrant, namely the Bouckville Hotel, of which the defendant is the proprietor, at Bouckville, New York, in the Northern District of New York, and there, the defendant being present, searched the premises and found one pint of gin, a pint of beer in the bar room of the said premises, and also found in the cellar of said premises under said bar room three and a half barrels of liquid, ..."

The Fourth Amendment provides—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The National Prohibition Act, § 25, 41 Stat. 305, 315, U. S. C. A., Title 27, § 39, authorizes the issuance of warrants to search for intoxicating liquors under the circumstances specified by Title XI, Public Laws No. 24, 65th Congress (Espionage Act), approved June 15, 1917, 40 Stat. 228. The following are among the provisions of the latter Act—

"Sec. 2. A search warrant may be issued under this title upon either of the following grounds:

"3. When the property, or any paper, is possessed, controlled, or used in violation of section twenty-two of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed.

"Sec. 3. A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

"Sec. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

"Sec. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

"Sec. 6. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

"Sec. 11. A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void."

Counsel for the United States submit that while under the Espionage Act (§ 11) a search warrant not executed within ten days becomes invalid, the statute does not inhibit utilization of an outlawed warrant as a mere form or blank when preparing a new one based upon the original affidavit; that here the act of the Commissioner in changing the date upon the July sixth warrant and then reissuing it under date of July twenty-seventh was to all intents and purposes the issuing of an entirely new and valid warrant supported by the Dodd affidavit of July sixth. This argument is pertinent and should be answered.

It fairly may be assumed that the Commissioner who issued the warrant on July twenty-seventh relied upon the original (July sixth) affidavit which remained before him; and if this was permissible, the new warrant, of course, was good—just as good as if no earlier one had been issued upon the same affidavit. But if the original affidavit had become stale by the passage of time, then the new warrant lacked adequate support and was invalid. Manifestly, it is important that there should be some definite rule by which to determine when such an affidavit is impotent; otherwise, the matter is left at large—dependent upon varying views of reasonableness.

The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating such process, should be liberally construed in favor of the individual. *Boyd* v. *United States,* 116 U. S. 616, 635; *Adams* v. *New York,* 192 U. S. 585; *Byars* v. *United States,* 273 U. S. 28; *Marron* v. *United States,* 275 U. S. 192, 196, 197.

The statutes require that a warrant to search for intoxicating liquors shall rest upon duly established probable cause to believe that at the time it issues the liquor is unlawfully possessed. The supporting affidavit must re-

late to facts which tend to show an unlawful situation actually or probably existing at the moment. Section 11, Espionage Act, declares that after ten days a warrant not fully executed shall be void. That is the prescribed period during which the circumstances existing when it issued can be supposed to continue.

Considering the whole statute, and especially the evident purpose of Congress to protect against unnecessary delays and uncertainties, I think no search warrant should issue upon an affidavit more than ten days old. After attaining that age statements therein cannot properly indicate presently existing conditions. In practice the contrary view would permit results which the prescribed ten days' limitation was intended to prevent. The disclosed unlawful situation is not presumed to continue more than ten days after a warrant issues and it seems entirely reasonable to conclude that Congress did not intend to sanction a less rigid limitation upon the supporting affidavit.

It follows that the Commissioner's warrant of July twenty-seventh was invalid, even if it be assumed that he then actually relied upon the original supporting affidavit dated three weeks earlier.

BURNS *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 378. Argued November 15, 1932.—Decided December 5, 1932.

Defendant, while serving a prison sentence under one count of an indictment and while at the same time on probation as to an independent sentence imposed under another count, was guilty of repeated abuses of a liberty to leave the jail, granted to him for a particular purpose. Upon a summary hearing before the District Judge, the facts of these abuses were proved by witnesses

and admitted by the defendant. The order of probation bore the express condition that the probationer should refrain from violations of law "and in all respects conduct himself as a law-abiding citizen." *Held*, construing the Federal Probation Act:

1. Revocation of the probation need not be preceded by specific charges and a formal hearing thereon. P. 219.

2. A condition of the probation necessarily implied was that the probationer should not be guilty of conduct inconsistent with obedience to his prison sentence. P. 222.

3. Whether there should be a revocation was a matter within the discretion of the District Judge. P. 223.

4. Revocation of the probation was not an abuse of discretion. P. 224.

59 F. (2d) 721, affirmed.

CERTIORARI* to review the affirmance of an order revoking probation.

Mr. Otto Christensen for petitioner.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist*, and *Messrs. Paul D. Miller, Mahlon D. Kiefer*, and *Wm. H. Riley, Jr.*, were on the brief, for the United States.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The Court granted certiorari to review the decision of the Circuit Court of Appeals affirming an order revoking probation. 59 F. (2d) 721. On a plea of guilty to three counts of an indictment, petitioner was sentenced, on May 4, 1931, on the first count to imprisonment for one year, on the second count to pay a fine of $2,000, and on the third count to imprisonment for five years. Execution of the last-mentioned sentence was suspended and the court granted probation upon the following terms,— "during such time as the defendant reports regularly

* See Table of Cases Reported in this volume.

every three months in writing, beginning with this date, to the federal probation officer of this court; during which time he entirely refrains from any violation of any law with the possible exception of parking and traffic ordinances, and in all respects conducts himself as a law-abiding citizen. In case of the violation of the terms of probation, the defendant will be brought before the court and sentenced. Probation is granted for a period of five years."

On January 21, 1932, while petitioner was serving his sentence on the first count, he was brought before the court, by its direction, for the purpose of investigating a report that he had violated the terms of probation. After a brief recess to permit the attendance of counsel for petitioner, the court held a summary hearing. A special agent of the Department of Justice testified that the jail records, a copy of which was produced, showed that on fifteen days between May 10th and August 18th, 1931, petitioner had been absent from the jail for long periods ranging from nearly four hours to over twelve hours; that an order had been made permitting him to visit a dentist for necessary dental work, but that on August 18th the agent had found petitioner at his home. Petitioner was examined on his own behalf and from his cross-examination it appeared that on one occasion, when the record showed that he had been away from the jail from 10 a. m. until 9.06 p. m., he had been at his home in the evening "listening to the radio, something like that." He was unable to say how often he had gone to his home when he was supposed to be visiting the dentist; it was "quite a few times. Q. Most of the time? A. Pretty near." He further testified: "Q. When you left the jail and didn't go to the dentist's office, were you and Lessner [a deputy marshal] riding around or were you at your house and would Lessner ride around? Is that right? A. Yes." On redirect examination, petitioner added that when he was out he

asked to be taken home to get a change of clothes; that usually each time he went to the house he went for a change of linen.

After petitioner had testified, the court, denying the request of petitioner's counsel for an opportunity to present further evidence, especially as to matters upon which the court did not base its conclusion, revoked the probation order. The court said that "there is enough obviously before this court to show that the spirit of the probation was not in any sense complied with." The Circuit Court of Appeals, reviewing petitioner's testimony at length, sustained the order as based not upon "a technical escape, but upon the fact that the appellant had not acted in good faith in carrying out the order of the trial judge, but, on the contrary, had taken advantage of a general permit to carry out his own purposes quite independently of the basis and theory upon which the order was given." 59 F. (2d) p. 724.

First. Petitioner objects to the summary character of the proceeding. He urges that he was entitled to previous notice of specific charges of violation of the terms of probation and to a hearing upon such charges according to the established rules of judicial procedure. As opposed to the action sanctioned below he invokes principles announced in *Hollandsworth* v. *United States* (C. C. A. 4th), 34 F. (2d) 423, 428, and in certain decisions of state courts dealing with procedure under state probation laws. See *State* v. *Zolantakis,* 70 Utah 296; 259 Pac. 1044; 54 A. L. R. Ann. 1463, 1471, *note.*[1]

[1] See, also, *Riggs* v. *United States* (C. C. A. 4th), 14 F. (2d) 5, 9, 10; *Furrow* v. *United States* (C. C. A. 4th), 46 F. (2d) 647; *Ex parte Lucero,* 23 N. Mex. 433; 168 Pac. 713; *State* v. *O'Neal,* 147 Wash. 169; 265 Pac. 175; *Plunkett* v. *Miller,* 161 Ga. 466; 131 S. E. 170; *Williams* v. *State,* 162 Ga. 327; 133 S. E. 843; *State* v. *Hardin,* 183 N. C. 815; 112 S. E. 593; *Weber* v. *State,* 58 Ohio St. 616; 51 N. E. 116. Compare *Campbell* v. *Aderhold* (N. D. Ga.), 36 F. (2d) 366,

The Federal Probation Act (March 4, 1925, c. 521, 43 Stat. 1259; U. S. C., Tit. 18, §§ 724–727), confers an authority commensurate with its object. It was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable. *United States* v. *Murray*, 275 U. S. 347, 357, 358; H. R. Rep. No. 423, 68th Cong., 1st Sess. Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, when satisfied "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved," to suspend the imposition or execution of sentence and "to place the defendant upon probation

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367; *United States* v. *Mulligan* (C. C. A. 2d), 48 F. (2d) 93, 94; *Jianole* v. *United States*, (C. C. A. 8th), 58 F. (2d) 115, 117; *People ex rel. Forsyth* v. *Court of Sessions*, 141 N. Y. 288; 36 N. E. 386; *People ex rel. Pasco* v. *Trombly*, 173 App. Div. (N. Y.) 497; 160 N. Y. S. 67; *People ex rel. Woodin* v. *Ottaway*, 247 N. Y. 493, 497; 161 N. E. 157; *Commonwealth* v. *McGovern*, 183 Mass. 238; 66 N. E. 805; *Finer* v. *Commonwealth*, 250 Mass. 493; 146 N. E. 23; *People* v. *Dudley*, 173 Mich. 389, 392, 395; 138 N. W. 1044; *Richardson* v. *Commonwealth*, 131 Va. 802, 810, 811; 109 S. E. 460; *State* v. *Sullivan*, 127 S. C. 186; 121 S. E. 47; *State* v. *Miller*, 122 S. C. 468, 473–475; 115 S. E. 742; *People* v. *Sapienzo*, 60 Cal. App. 626; 213 Pac. 274; *People* v. *Sanders*, 64 Cal. App. 1; 220 Pac. 24.

for such period and upon such terms and conditions as they may deem best."

There is no suggestion in the statute that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. The authority for the latter purpose immediately follows that given for the former, and is in terms equally broad. "The court may revoke or modify any condition of probation, or may change the period of probation." There are no limiting requirements as to the formulation of charges, notice of charges, or manner of hearing or determination. No criteria for modification or revocation are suggested which are in addition to, or different from, those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant. The only limitation, and this applies to both the grant and any modification of it, is that the total period of probation shall not exceed five years. Act of March 4, 1925, § 1.

Such procedural provisions as the Act contains harmonize with the view that the continuance of the probation, as well as the grant of it, rests in the court's discretion. The probation officer, when directed by the court, must report to the court with a statement of the conduct of the probationer. "The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable." *Id.*, § 2. The broad authority of the court remains unimpaired. At any time within the probation period, the probationer may be arrested, either with or without warrant, and thereupon he "shall forthwith be taken before the court." Also, after the probation period has expired, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the

defendant to be arrested and brought before it. "Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." *Id.*

The duty placed upon the probation officer to furnish to each probationer under his supervision "a written statement of the conditions of probation" and to "instruct him regarding the same" (*id.*, § 4) cannot be deemed to restrict the court's discretion in modifying the terms of probation or in revoking it. The evident purpose is to give appropriate admonition to the probationer, not to change his position from the possession of a privilege to the enjoyment of a right. He is still a person convicted of an offense, and the suspension of his sentence remains within the control of the court. The continuance of that control, apparent from the terms of the statute, is essential to the accomplishment of its beneficent purpose, as otherwise probation might be more reluctantly granted or, when granted, might be made the occasion of delays and obstruction which would bring reproach upon the administration of justice. See *Campbell* v. *Aderhold,* 36 F. (2d) 366, 367; *United States* v. *Mulligan,* 48 F. (2d) 93, 94; *Jianole* v. *United States,* 58 F. (2d) 115, 117; *Commonwealth* v. *McGovern,* 183 Mass. 238; 66 N. E. 805; *People ex rel. Pasco* v. *Trombly,* 173 App. Div. (N. Y.) 497, 499; 160 N. Y. S. 67; *Richardson* v. *Commonwealth,* 131 Va. 802, 810, 811; 109 S. E. 460; *People* v. *Dudley,* 173 Mich. 389, 392, 395; 138 N. W. 1044; *People* v. *Sanders,* 64 Cal. App. 1; 220 Pac. 24.

The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious

judgment, not arbitrary action. *The Styria,* 186 U. S. 1, 9. It takes account of the law and the particular circumstances of the case and "is directed by the reason and conscience of the judge to a just result." *Langnes* v. *Green,* 282 U. S. 531, 541. While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.

Second. Applying these principles, it is apparent that the instant case has the peculiar feature that the probationer was actually serving a jail sentence while on probation with respect to another sentence. But, even in jail, he was subject to the conditions of the probation. By its terms, he was to refrain from violation of law and "in all respects conduct himself as a law-abiding citizen." As, at the same time that the sentence in question was suspended and probation was granted, he was committed to jail upon a distinct sentence, there was also a condition necessarily implied that he should not be guilty of conduct inconsistent with obedience to that sentence. Abuse of the liberty granted him to leave the jail for a particular purpose, and absenting himself in the circumstances described in his testimony,—apart from the question of violation of law (see Act of May 14, 1930, c. 274, § 9, 46 Stat. 325, 327; U. S. C., Tit. 18, § 753h)—was clearly a breach of that condition and the court was entitled to take note of it.

There is, properly speaking, no question here of notice. Defendant was brought before the court and questioned. Defendant was not only heard but gave his testimony. The inquiry related to his own conduct in connection with his leaving the jail, and the court could properly restrict the examination to what was pertinent to that conduct and could refuse to extend the inquiry to embrace other matters. The hearing was summary but it cannot be said that it was improper or inadequate, in view of the nature of the proceeding and of the particular point upon which

the court rested its decision. The court revoked the probation upon defendant's admissions of his dereliction and it does not appear that there was an abuse of discretion.

Judgment affirmed.

GWINN *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 31. Argued November 9, 10, 1932.—Decided December 5, 1932.

1. The provision of the Revenue Act of 1924 for including the interest of a joint tenant of property in computing transfer taxes on his estate, is applicable to tenancies created before September 8, 1916, when the first of the recent federal statutes providing for such taxation became effective. P. 226.
2. A state rule that the accrual of property resulting to one of two joint tenants from the death of the other is not to be taxed if not taxable under statutes in force when the tenancy was created, could not limit the power of Congress in respect of federal taxation. P. 227.
3. Where by the state law (as in California) the rights of the future survivor of two joint tenants are not irrevocably fixed at the creation of the tenancy, but the joint estate may be terminated by the voluntary conveyance of either tenant, or by partition, or involuntary alienation under execution, a co-tenant's death, by ending the right to effect such changes, presents a proper occasion for imposing a federal transfer tax under the Act of 1924, passed before the death, though after the creation of the tenancy. *Tyler* v. *United States,* 281 U. S. 497. P. 228.

54 F. (2d) 728, affirmed.

CERTIORARI, 286 U. S. 537, to review the affirmance of an order of the Board of Tax Appeals, 20 B. T. A. 1052, which had sustained an appraisal of a decedent's estate by the Commissioner of Internal Revenue.

Messrs. Thomas A. Thacher, Llewellyn A. Luce, and *Ralph W. Smith* submitted for petitioner.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Sewall Key* and *Erwin N. Griswold* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

June —, 1915, J. H. Gwinn, the petitioner here, and his mother, Mrs. M. A. Gwinn, residents of California, acquired by equal contributions certain property, as joint tenants with the right of survivorship, which they continued to hold until her death, October 5, 1924. He is the beneficiary of the estate and in possession of its assets.

The Revenue Act approved June 2, 1924, c. 234, 43 Stat. 253, 304 (U. S. C., Title 26, § 1094) provides—

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— . . .

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: . . .

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

When he appraised the gross estate of Mrs. Gwinn for taxation under the Act of 1924, the Commissioner of In-

ternal Revenue included the value of one-half the property which she and her son had acquired as stated. This was challenged as error. The Board of Tax Appeals upheld the Commissioner and the Circuit Court of Appeals affirmed its order.

The petitioner maintains—

That the word "before" in Subdivision (h), § 302, *supra,* should be construed as referring only to the period between June 2, 1924, and September 8, 1916, when the first of recent Federal estate tax statutes (39 Stat. 777) became effective.

That under the tenancy created in June, 1915, each party acquired immediate joint ownership in the whole property; that his interest therein then became completely vested and no change in title or transfer of interest occurred by reason of the co-tenant's death. No interest ceased or passed at the death. The Commissioner is attempting, arbitrarily, capriciously and in violation of the due process clause of the Fifth Amendment, to tax something created, transferred and vested in the survivor prior to the first (1916) federal estate tax law.

The clear language of the 1924 statute repels the notion that it has no application to joint tenancies created prior to September 8, 1916. *Nichols* v. *Coolidge,* 274 U. S. 531. The contrary view is not aided (as claimed) by *Phillips* v. *Dime Trust & Safe Deposit Co.,* 284 U. S. 160.

The Estate of Gurnsey (1918), 177 Cal. 211; 170 Pac. 402, is relied upon to support the postulate that under the laws of California no novel tax can be laid on account of rights accruing to the survivor by an enactment subsequent to the creation of the joint tenancy. There the death occurred February 9, 1915. Claiming authority under the Act of 1913, the State Controller sought to collect an inheritance tax upon a bank deposit credited to the joint account of the decedent and another in April, 1911. The court declared the transfer to the joint account was

complete and the title to the fund became vested in the joint tenants when the deposit was made. Also, "the rule on the subject is that the question of liability to inheritance taxes must be determined by the law in force at the time the title vests in virtue of the transfer." And, the conclusion was that the law in force in 1911 "did not undertake to impose a tax upon the rights accruing to a surviving joint tenant upon the death of his co-tenant." The claim of the State Controller was accordingly rejected and the fund declared not liable to taxation under the Act of 1913.

This opinion recognizes that some rights accrue "to a surviving joint tenant upon the death of his co-tenant," and the possibility of taxation by reason of this fact. But it apparently affirms that under the rule approved in California liability for such taxation must be determined according to law in force when the co-tenancy is established.

To support its affirmation concerning this rule the court cited only *Hunt* v. *Wicht,* 174 Cal. 205; 162 Pac. 639. That cause grew out of an effort, after the grantor's death in 1913, to impose a tax under the statute of 1911 on account of the absolute transfer made in 1905 of a present title to real property subject only to a life estate. The ruling was that a tax based on that transaction could not be laid by an after-enacted statute. There was no suggestion that the doctrine there accepted could have application if the imposition had relation only to circumstances which would arise in the future. But in no view could the supposed rule limit the power of Congress in respect of federal taxation.

In *Tyler* v. *United States,* 281 U. S. 497, 503, 504, where the question at issue was similar to the one now presented, this Court declared—

"The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the

property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights. . . .

"At his [the co-tenant's] death, however, and because of it, she [the survivor] for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax."

Although the property here involved was held under a joint tenancy with the right of survivorship created by the 1915 transfer, the rights of the possible survivor were not then irrevocably fixed, since under the state laws the joint estate might have been terminated through voluntary conveyance by either party, through proceedings for partition, by an involuntary alienation under an execution. Calif. Code Civ. Procedure, § 752; *Green* v. *Skinner,* 185 Cal. 435; 197 Pac. 60; *Hilborn* v. *Soale,* 44 Cal. App. 115; 185 Pac. 982. The right to effect these changes in the estate was not terminated until the co-tenant's death. Cessation of this power after enactment of the

Revenue Act of 1924 presented proper occasion for imposition of the tax. The death became the generating source of definite accessions to the survivor's property rights. *Tyler* v. *United States, supra.* See *Saltonstall* v. *Saltonstall,* 276 U. S. 260; *Chase National Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339.

Nichols v. *Coolidge,* 274 U. S. 531; *Untermyer* v. *Anderson,* 276 U. S. 440, and *Coolidge* v. *Long,* 282 U. S. 582, are inapplicable. In them the rights of the survivors became finally and definitely fixed before the passage of the act—nothing was added as the result of death.

The judgment below must be

Affirmed.

ALTON RAILROAD CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 81. Argued October 10, 11, 1932.—Decided December 5, 1932.

1. Where one of several carriers which, by their agreement, have established joint rates and fixed the divisions, is illegally deprived of part or all of its agreed share through the action of the other carriers in dividing the freight collections on another basis, the aggrieved carrier is entitled to apply under § 15 (6) of the Interstate Commerce Act for an order that the agreed divisions be maintained; and the Commission can not refuse to entertain the complaint. P. 236.
2. An order of the Commission denying relief under such an application, upon a finding that the reduced divisions complained of are not "unjust, unreasonable, or otherwise unlawful," is in effect an order reducing the divisions to which the complaining carrier was entitled under the agreement; it is a "negative" order in form only. P. 237.
3. The Commission, in concluding that the share received by the complaining carrier was not unjust, unreasonable, or otherwise unlawful, construed the words of § 15 (6), "importance to the public of the services of such carriers," as referring to the im-

portance of the particular services in question, and the term "intermediate line" as including a road over which was "reshipped" warehoused grain that had been brought in by other roads with which it did not participate in joint rates. *Held*

That the correctness of these constructions, and the question whether a noncompensatory share of existing joint rates can constitutionally be imposed by the Commission, are questions subject to review in a suit under the Urgent Deficiencies Act to set aside that part of the order. P. 239.

4. There may be judicial review of a part of an order of the Commission. P. 237.

58 F. (2d) 399, reversed.

APPEAL from a decree of the District Court of three judges dismissing a bill to set aside part of an order of the Interstate Commerce Commission. The ground of dismissal was that the order was negative in character and that therefore the court had no jurisdiction.

Mr. Frank H. Towner, with whom *Mr. Silas H. Strawn* was on the brief, for appellant.

Mr. J. Stanley Payne, with whom *Solicitor General Thacher, Assistant to the Attorney General O'Brian,* and *Mr. Daniel W. Knowlton* were on the brief, for the United States and the Interstate Commerce Commission.

Mr. Leo P. Day appeared for the railroad companies, appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit, under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220, was brought by The Alton Railroad Company in the federal court for northern Illinois to set aside part of an order entered by the Interstate Commerce Commission under § 15 (6) of the Interstate Commerce Act, see Transportation Act February 28, 1920, c. 91, § 418, 41 Stat. 456, 475, 486. The

defendants are the United States and, by intervention, the Commission and carriers adversely interested. The proceeding before the Commission was commenced by the receivers of the Chicago & Alton "to establish just, reasonable, and equitable divisions" of existing joint rates for grain and grain products from Peoria, Illinois, to points east of Buffalo.[1] The Commission found that the divisions of the so-called "local" rates were too low, and ordered them increased. It found that the divisions of the so-called "reshipping" rates were "not unjust, unreasonable or otherwise unlawful" and refused relief as to them. Wheelock v. Akron, Canton & Youngstown Ry. Co., 169 I. C. C. 594; 179 I. C. C. 517.[2] The Alton Railroad (the

[1] The proceedings before the Commission involved also the rates from Pekin, which lies about ten miles from Peoria. But as the inbound and outbound rates to and from these two points and the transit regulations and practices in effect are the same as to both, only Peoria will be referred to.

[2] Division 5 of the Commission, after a hearing, found that the share accorded the Alton was unreasonable and otherwise unlawful, and fixed new divisions. On petition by the defendants, the order of Division 5 was indefinitely postponed and a rehearing before the full Commission granted. The order entered by the full Commission reads as follows:

"This case having been reheard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report on rehearing containing its findings of fact and conclusions thereon, which said report, together with the original report and order herein, 169 I. C. C. 594, is hereby referred to and made a part hereof; and the commission having found in said report on rehearing, (1) that just, reasonable, and equitable divisions to be received, respectively, by complainants herein and the defendant carriers east of Chicago, Joliet, or Dwight, Ill., out of the joint nontransit rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin, Ill., via Chicago, Joliet, or Dwight, to destinations in eastern trunk-line and New England territories, east of Buffalo, N. Y., over the lines of complainants to Chicago, Joliet, or Dwight, will be the specific or arbitrary over the Chicago reshipping rate to

corporation which acquired the line under the reorganization, Alton R. Co. Acquisition and Stock Issue, 175 I. C. C. 301), insists that by so denying relief the Commission has, in view of the facts specifically found, subjected its property to confiscation; and on this ground seeks to have that part of the order set aside.

Lines of the Alton extend from Peoria to Chicago, Joliet and Dwight, Illinois and at each of those cities connect with railroads whose lines extend to the East. Peoria is an important market for grain received from the West and Northwest. At Peoria the grain goes into elevators. There it may be sold and resold or it may be manufactured into grain products and by-products. Much of the grain is later shipped from Peoria to the East in the form of grain products and by-products. The transportation of grain consigned to Peoria is completed, however, by the unloading of the cars there and the payment of charges. The carriers serving Peoria have not established joint rates from such points of origin of the grain

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complainants and the reshipping rate from Chicago to destination to the carriers defendant east of Chicago; and (2) that the present divisions of joint reshipping or proportional rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin over the lines of complainants to Chicago, Joliet, or Dwight, destined to points in eastern trunk-line and New England territories east of Buffalo, are not unjust, unreasonable, or otherwise unlawful as alleged by complainants:

"It is ordered that the aforementioned original order of November 28, 1930, be, and it is hereby, vacated and set aside.

"It is further ordered that the above-named defendants, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before January 16, 1932, and thereafter to abstain from demanding, collecting, or receiving divisions of the joint nontransit rates specified in the preceding paragraph which do not allow said complainants the divisions found in said reports to be just, reasonable, and equitable.

"And it is further ordered that this order shall continue in force until the further order of the commission."

to the East, with a transit privilege at Peoria. Compare *Central R. Co.* v. *United States,* 257 U. S. 247. But the tariffs of outbound joint rates from Peoria to points east of Buffalo, voluntarily established by the Alton and connecting railroads, provide for a lower scale of rates applicable, under certain conditions, to grain and the products of grain which had a rail movement inbound from the territory referred to. This lower scale is called "reshipping" rates; and the merchandise shipped thereunder is called transit grain or grain products.[3] The higher scale applicable to other grain or grain products is called "local" rates. Compare *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 279 U. S. 768.

Until July 1, 1929, the divisions of both classes of rates were fixed by agreement of the Alton and the connecting lines. Then, the connecting lines, without the sanction of the Commission and over the protest of the Alton, reduced, for both classes of rates, the amounts paid to it as divisions. The connecting lines were and are physically in a position to deprive the Alton of a larger share by

[3] Reshipping rates from Peoria vary somewhat with the point of origin of the grain. A subsequent outbound shipment of grain or its products may be from a shipment which did not move inbound from the territory above referred to. But the shipper, in order to avail himself of the reshipping rates on outbound grain, grain products or by-products, must establish the fact that he sent an equivalent amount of like grain from the point of origin to Peoria within the twelve-month period allowed for transit privileges. This proof is made by the presentation of paid freight bills as memoranda of the inbound shipments. Compare Surrendered Tonnage Slips at Transit Points, 77 I. C. C. 239. The inbound and outbound shipments are carried under separate bills of lading; the final destination of the grain is usually undetermined at the time of the inbound shipment. In this respect the practice differs from that of through shipment with transit privileges. On the prevalence, legality, and possible abuses of both reshipping rates and through rates with transit privileges, see *Atchison, T. & S. F. Ry. Co.* v. *United States,* 279 U. S. 768, 777–780, and cases there cited.

reason of the fact that the freight is collected at the destinations and distributed by the collecting carrier. The haul on the Alton outbound from Peoria is from 82 to 155 miles, dependent upon the route selected. The divisions constitute the only revenue received by the Alton for the service performed by it under the "reshipping" rates. Under the reduced allowances the Alton does not receive on any shipment more than 2 cents per 100 pounds and on many shipments it receives nothing.[4] The Com-

[4] As stated in note 3, *supra*, the reshipping rates from Peoria to the East vary with the points of origin of the grain or grain product. Thus the reshipping rate from Peoria to New York on grain originating in the Northwest is 30.5 cents per 100 pounds, while that on grain originating in the Illinois-Iowa territory is 32.5 cents. On grain originating at other points the rates fall somewhere between these two figures. The outbound reshipping rate from Chicago to New York, with exceptions not material here, is 30.5 cents irrespective of the point of origin. The inbound rates to Chicago and to Peoria are the same on shipments from the Illinois-Iowa territory, but on shipments from the Northwest the inbound rate to Peoria is 2 cents less than to Chicago; and on shipments from other points the difference is less than 2 cents. It is evident that the outbound reshipping rates from Peoria, varying as they do with the point of origin of the grain, are designed to equalize the total rate from point of origin to final destination, whether Peoria or Chicago is taken as the place for utilizing transit privileges. Stated in general terms, where the rate to Peoria is less than that to Chicago, the rate from Peoria is correspondingly greater than that from Chicago. In no case is this excess of outbound rate from Peoria over that from Chicago more than 2 cents per 100 pounds; and in some cases there is no excess. It is this excess, if any exists, of the rate from Peoria over the 30.5 cent rate from Chicago that constitutes the share being paid to the Alton by the connecting lines out of the joint rate from Peoria to New York. The connecting carriers invariably retain 30.5 cents as their own share, leaving the Alton a maximum of 2 cents per 100 pounds as its allotment. In some instances—specifically, on shipments of grain whose origin was in the Northwest—the Alton receives nothing, although it may have hauled the grain over its line from Peoria 155 miles.

mission did not suggest that the divisions so received could be deemed compensatory for the outbound haul. It justified its conclusion that the divisions were not "unjust, unreasonable, or otherwise unlawful" on the ground that the transportation service for the performance of which the Alton sought increased divisions was not of importance to the public; and that if the Alton desired to participate in the transportation and was dissatisfied with the share allotted, it should secure in some way allowances from the carriers which bring the grain into Peoria.

The District Court, three judges sitting, did not consider the merits of the controversy. It dismissed the bill on the ground that the part of the order complained of was negative in character; and that hence the court was without jurisdiction. The case is here on direct appeal. Whether the order is a negative one within the meaning of the rule, compare *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *United States* v. *Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, is the main question requiring decision. The Alton concedes that courts have ordinarily no power to review a finding of the Commission that a particular division is not unreasonable or inequitable. The Alton's contention is that while the joint rates are in force it is obliged to accept traffic under them; that until the Commission decides otherwise it is entitled to the divisions agreed upon when the joint rates were established; that the order of the Commission in approving the reduced allowance to the Alton made by the connecting carriers in effect established new divisions; and that since these are obviously confiscatory, the order is void.

First. The order while negative in form was, in effect, an affirmative one. The joint "reshipping" rates and the divisions thereof were established by agreement of the carriers participating in the transportation. The divisions were a term of that agreement. So long as the

joint rates voluntarily established remain in force, each carrier is entitled as of right to the division originally agreed upon, unless a readjustment of the divisions has been made either by the parties or by the Commission pursuant to the power conferred by paragraph 6 of § 15. The connecting carriers were legally without power to reduce the divisions of the Alton over its objection. If they deemed its divisions unreasonably large, they could have invoked the power of the Commission to make a reduction. Instead of applying to the Commission to adjust the existing divisions they resorted to force. Availing themselves of their strategic position as collectors of the freight, they withheld from the Alton a part of what was due it.

The Alton might have sued at law for the part of the divisions wrongfully withheld. *St. Louis S. W. Ry. Co.* v. *Bolinger & Co.*, 17 F. (2d) 924; compare *Malvern & F. V. R. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 182 Fed. 685. But that was not its only remedy. Under § 15 (6) it was entitled to invoke the jurisdiction of the Commission.[5] It could, obviously, have applied to the Commission to have the agreed divisions increased; and, likewise, it was entitled to apply to secure a determination that the agreed divisions shall be maintained. The Commission was not at liberty to decline to exercise its jurisdiction. Paragraph 6 imposed upon it the obligation to act upon the complaint. Compare *New England Divisions Case*, 261 U. S.

[5] In its complaint to the Commission, the Alton charged that the divisions allotted to it were unjust and unreasonable and in violation of the Interstate Commerce Act, as amended. The Commission has held that it has no authority to enforce agreements for divisions, apart from a showing of such violation of the Act. Laona & Northern R. Co. *v.* Minneapolis, St. P. & S. Ste. M. Ry. Co., 52 I. C. C. 7; compare Morgantown & Wheeling Ry. Co. *v.* Pennsylvania R. Co., 63 I. C. C. 197. Section 208 (b) of Transportation Act, 1920, provides: "All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect

184; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274. The Commission's finding that the Alton's divisions were "not unjust, unreasonable or otherwise unlawful," and the refusal of relief, had the effect of reducing the divisions which had been fixed by agreement of the parties and to which, but for the Commission's action, the Alton would have continued to be legally entitled.

Second. The jurisdiction of courts to review orders of the Commission is not dependent upon the form in which the order is couched. If the eastern carriers had applied to the Commission for a change in the divisions fixed by agreement, and the Commission had authorized divisions precisely like those which they are now imposing upon the Alton by their unauthorized action, the order would have been affirmative in form and would obviously have been subject to attack by the Alton in a suit in the federal court. By their unauthorized action the connecting carriers forced the Alton to become the moving party before the Commission, with the result that the Commission's approval of the divisions effected by them was expressed in the form of a refusal to interfere. This result of the alignment of parties does not endow the Commission's order with immunity from judicial review.

An order of the Commission which denies relief in part, or which dismisses the complaint, may be reviewed by a court. *Intermountain Rate Cases*, 234 U. S. 476, 490; *United States* v. *New River Co.*, 265 U. S. 533, 539–541.

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until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively." The purpose of this provision, as stated by Chairman Esch of the House Committee on Interstate and Foreign Commerce, was to prevent rates and divisions from reverting, *ipso facto*, upon termination of federal control, to their pre-control status. See H. R. No. 456, 66th Cong., 1st Sess., p. 12; 58 Cong. Rec., p. 8314. The Commission has held that this provision did not confer authority upon it to enforce agreements for divisions. *Hampton & Branchville R. Co.* v. *Atlantic Coast Line R. Co.*, 88 I. C. C. 77, 84.

To annul the order would not, as in *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 412, merely leave unchanged the very situation which the Commission's order refused to alter. Here the Alton, by virtue of the preëxisting agreement for divisions, would secure a measure of protection simply from the annulment of the order. To take jurisdiction would not be tantamount to usurpation by the court of the functions of the Commission. The court is not called upon here, as it was in *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 483, and *Standard Oil Co.* v. *United States,* 283 U. S. 235, 241, to afford relief which the Commission, in the exercise of its powers, had found that the complainant was not entitled to receive.[6] The court is not asked to prescribe reasonable divisions, or to

[6] Compare also *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, in which the petition in the Commerce Court included a prayer that the defendant railroads be enjoined from collecting demurrage charges on the complainant's tank cars while on its own tracks—the relief which the Commission had refused to grant.

After the decision in the Procter & Gamble case, eleven cases pending in the Commerce Court were dismissed by it for want of jurisdiction. In five of these the Commission had refused to award reparation; in three it had refused to order the establishment of through routes and joint rates; in one it had refused both an award of reparation and the establishment of through routes and joint rates; in one it had dismissed a complaint challenging the lawfulness of rates; and in one it had dismissed a complaint attacking an advanced rate as unreasonable. See Twenty-sixth Ann. Rep. I. C. C., pp. 34, 202–205.

The Commission thus understood the import of the Procter & Gamble decision: "Its [this Court's] conclusion was that upon the plain reading of that statute the jurisdiction of the court was confined to restraining the operation of the orders of the Commission and that it possessed no affirmative authority to enforce the administrative provisions of that act. . . . The central thought to be gathered from this exposition of the law seems to be that the administrative judgment of the Commission, as expressed by its orders, can not be reviewed by the courts, in so far as they are within its delegated authority, not confiscatory, and not palpably arbitrary and unreasonable." *Id.,* pp. 24, 27.

direct that they be prescribed by the Commission.[7] The court is asked to find that the Commission denied the Alton a constitutional right as a result of acting upon erroneous principles of law, and therefore to enjoin that part of the order.

The determination of the questions presented is properly within the scope of judicial review of the Commission's orders. The questions are not the correctness of its conclusion as to the reasonableness of the divisions, or the correctness of its findings as to any of the factors which the Act directs it to consider in determining reasonableness. The question is the correctness of the legal principles adopted by the Commission as a basis for reaching a conclusion from its findings. The Commission reasoned that since the particular transportation services of the Alton here in question were not of importance to the public, and since the Alton was in substance an intermediate, not an originating carrier, it might be denied a compensatory share of the existing joint rates with the defendant carriers. Whether the "importance to the public of the transportation services of such carriers," as specified in the Act, means the importance of the particular services in question, and whether a carrier not participating in joint rates with inbound roads is an "intermediate line" within the meaning of the section dealing with divisions, are questions upon which a court may properly pass. So too is the more fundamental question whether, assuming the Commission was correct in its construction of the Act, it follows that a noncompensatory share of existing joint rates may be imposed. Upon these questions the Alton was entitled to invoke the judg-

[7] Compare *Hooker* v. *Knapp*, 225 U. S. 302, in which a mandatory injunction was asked requiring the Commission to annul its order and reopen the case. The bill was dismissed on the authority of *Procter & Gamble Co.* v. *United States*, 225 U. S. 282. Compare also, *Interstate Commerce Commission* v. *Waste Merchants Association*, 260 U. S. 32.

ment of the court. Compare *Southern Ry. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297, 301; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 449.

Third. The defendants contend that what is sought to be enjoined is not an "order" within the meaning of the Urgent Deficiencies Act. That contention is unsound. The action of the Commission presents none of the characteristics which have led this Court in other cases to hold that there was want of jurisdiction. It is part of an order, compare *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, 527; and the order is final, not tentative. Compare *Delaware & Hudson Co.* v. *United States*, 266 U. S. 438, 448. It was entered as the result of a formal controversy, not a project of the Commission, compare *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299; and it marked the disposition of the controversy, not a preliminary stage. Compare *United States* v. *Illinois Central R. Co.*, 244 U. S. 82.[8] The suit to enjoin the order is not premature. Compare *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469. It subjects the Alton to damage which is substantial, immediate and irreparable. If the order is allowed to stand, and the eastern carriers continue to retain their present share of the joint rates, the Alton's only redress will be a subsequent complaint before the Commission. Even if the Commission should then decide that the existing divisions are unreasonable, it might be powerless to award reparation for the period from the entry of the present order. *Brimstone R. Co.* v. *United States*, 276 U. S. 104, 121.

The decree of the District Court dismissing the bill for want of jurisdiction is reversed, and the cause remanded to it for further proceedings.

Reversed.

[8] Compare also, *New York, O. & W. Ry. Co.* v. *United States*, 14 F. (2d) 850, affirmed *per curiam* 273 U. S. 652.

Counsel for the United States.

EX PARTE UNITED STATES.

PETITION FOR A WRIT OF MANDAMUS.

No. 19, original. Argued November 7, 1932.—Decided December 5, 1932.

1. This Court has full power in its discretion to issue the writ of mandamus to a federal district court although the case be one in respect of which direct appellate jurisdiction is vested in the circuit court of appeals—this Court having ultimate discretionary jurisdiction by certiorari—, but such power will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this Court should be taken. Pp. 245, 248.
2. Application by the Government for a mandamus to require a federal district court to issue a bench warrant upon an indictment regularly found and fair on its face, *held* within the appellate jurisdiction of this Court. P. 249.
3. A district court, when asked by the Government to issue a bench warrant upon an indictment fair on its face and returned to it by its duly constituted grand jury, has no discretion to refuse. P. 249.
4. In the court to which the indictment is returned, the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer. P. 250.

Mandamus granted.

PETITION for a writ of mandamus requiring a District Court and its judge to set aside an order denying an application for a bench warrant. An opinion of the court below is reported *sub nom. United States* v. *Wingert,* 55 F. (2d) 960. The hearing in this Court was upon the petition and the return to an order to show cause.

Solicitor General Thacher, with whom *Assistant Attorney General Dodds* and *Messrs. Wm. H. Ramsey* and *Erwin N. Griswold* were on the brief, for the United States.

When an indictment has been returned, fair on its face and charging an offense within the jurisdiction of the court, the issuance of a bench warrant does not depend upon the exercise of judicial discretion.

A warrant of arrest may be sought from a magistrate prior to indictment upon the complaint of any person, either officer or citizen. In such a case it is plainly the magistrate's duty to determine whether the facts presented to him constitute probable cause for the issuance of a warrant. Such a determination involves the exercise of judicial discretion, and the magistrate is, of course, not subject to mandamus when he is acting in the legitimate exercise of his discretion. Many of the cases relied upon in respondent's brief relate to this situation and are obviously not pertinent here.

A warrant may be sought for the purpose of removing a person charged with crime from one district to another. Here again the question before the magistrate is one of probable cause.

Or a warrant of arrest may be sought, as in this case, to bring the accused into court after indictment. None of the cases cited by respondent's counsel relates to this question, and we know of none which directly decides it. See *In re Davis,* 107 N. J. Eq. 160, 175, 178; *State* v. *Gordon,* 18 La. Ann. 528; *Shaw* v. *Commonwealth,* 1 Duval 1. The duty to issue the warrant in such a case has long been recognized without question in our law. 1 Chitty, Crim. L., 339–340; 1 Archbold, Crim. Pro., 103; 2 Hale, Pleas of the Crown, 198–199; American L. Inst., Code of Crim. Pro., 1930 Official Draft, § 195. In many of the States, by statute, the warrant is issued by the clerk or district attorney, without any order of court.

That the duty of the district court to issue a bench warrant on an indictment is not discretionary, is plainly indicated by *United States* v. *Thompson,* 251 U. S. 407, 412–413; *Ex parte United States,* 242 U. S. 27, 42. It is a purely ministerial duty.

The Fifth Amendment contemplates the issuance of a bench warrant after an indictment has been found. The Fourth and Fifth Amendments are *in pari materia* (*Boyd* v. *United States,* 116 U. S. 616, 633), and must be read and construed together.

The lack of a preliminary hearing is not a sufficient reason for refusing to issue a bench warrant.

Mr. Francis Biddle for respondent.

Mandamus will not issue to compel performance of a discretionary act. It should not be used for an appeal or writ of error. *American Construction Co.* v. *Jacksonville Ry. Co.,* 148 U. S. 372. It does not follow that because the United States can not appeal, mandamus is a remedy.

A bench warrant issues on probable cause. *Benson* v. *Henkel,* 198 U. S. 1, 16; *Price* v. *Henkel,* 216 U. S. 488; *Hughes* v. *Gault,* 271 U. S. 142.

Cases cited by the United States deal with petitions for removal. I can find no cases specifically holding that an indictment furnishes probable cause for the issuance of a warrant of arrest, although such seems to be the practice. Informations, unsupported by affidavit, do not furnish the necessary grounds. *United States* v. *Tureaud,* 20 Fed. 621; *Johnston* v. *United States,* 87 Fed. 187; *United States* v. *Baumert,* 179 Fed. 735; *Weeks* v. *United States,* 216 Fed. 292; *United States* v. *Michalski,* 265 Fed. 839. Finding probable cause for the issuance of a search warrant is a judicial function. *United States* v. *Harnich,* 289 Fed. 256.

See *United States* v. *Judge Lawrence,* 3 Dall. 42, where the arguments are reported at length.

Compare, against the power to mandamus, *Washington ex rel. Romano* v. *Yakey,* 43 Wash. 15; *People* v. *McGuire,* 151 App. Div. (N. Y.) 413, 415; *DeGraff* v. *State,* 2 Okla. Crim. 519; *United States* v. *Ocampo,* 18 Philippine 1, 42; *In re Broom,* 18 Can. Cr. Cas. 254.

Contra: *Benners* v. *State,* 124 Ala. 97; *Attorney General ex rel.* v. *Police Justice,* 40 Mich. 631; *Nebraska ex rel.* v. *McCutcheon,* 20 Neb. 304; *State ex rel.* v. *Laughlin,* 75 Mo. 358. Some of these may be explained on the theory that the magistrate or lower court had refused to act. Cf. *Regina* v. *Adamson,* 1 Q. B. D. 201 (1876); *Rex* v. *Brothers,* 85 L. T. 581 (1901); *Rex* v. *Kennedy,* 86 L. T. 753 (1902); *Ex parte Burtis,* 103 U. S. 238.

The question of where the writ of mandamus should issue, if at all, is not here raised, as a decision of the judge's power is desired. But because no appeal could be taken to the Circuit Court of Appeals from this interlocutory order, does not mean that the case is not within the "appellate jurisdiction" of that court. And it may be doubted whether this Court has power to issue the writ where its jurisdiction is neither original nor appellate. *In re Massachusetts,* 197 U. S. 482; *In re Glaser,* 198 U. S. 171. For a recent discussion see *In re Babcock,* 26 F. (2d) 153. The true test is the existence of the jurisdiction, and not its prior invocation. *Barber Asphalt Co.* v. *Morris,* 132 Fed. 945, 955; *McClung* v. *Silliman,* 6 Wheat. 598; *Bath County* v. *Amy,* 13 Wall. 244; *McClellan* v. *Carland,* 217 U. S. 268; *Delaware, L. & W. R. Co.* v. *Rellstab,* 276 U. S. 1. For cases which held that the appellate jurisdiction had to be actually invoked, see *Muir* v. *Chatfield,* 255 Fed. 24; *United States* v. *Judges,* 85 Fed. 177. If the judgment is appealable, mandamus will not lie; nor even where there is no appeal, unless it appears that the court below had refused to act. *Ex parte Newman,* 14 Wall. 152.

Mr. Justice Sutherland delivered the opinion of the Court.

This is an application for a writ of mandamus requiring the federal district judge sitting in the United States District Court for the Eastern District of Pennsylvania

and the court itself to set aside an order denying a petition of the United States attorney for the issue of a bench warrant for the arrest of Joseph V. Wingert, [see *United States* v. *Wingert,* 55 F. (2d) 960] and directing that such bench warrant be issued. The case is here for decision upon the return of the court and judge to a rule to show cause why the application for the writ should not be granted. The facts follow.

On March 10, 1932, a grand jury for the district, duly empaneled, returned an indictment against Wingert, charging him with violating certain provisions of the banking laws of the United States. No question is raised as to the regularity of the proceedings before the grand jury, or as to the sufficiency of the indictment. On March 22, the United States attorney presented to the court a written petition praying that a bench warrant issue for Wingert's arrest. The district court, with nothing before it, so far as the record discloses, but the petition and the indictment, denied the petition and refused to issue the warrant. The sole ground alleged in the return for such denial is that the matter was within the judicial discretion of the court, and, therefore, not subject to mandamus proceedings.

1. It first is necessary to determine whether under these facts we have jurisdiction to issue the writ. Section 716, Rev. Stats. (§ 262 of the Judicial Code, U. S. C., Title 28, § 377), provides that this court and other federal courts "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." As early as 1831 it was settled that this court had power to issue a mandamus directed to a federal circuit court commanding that court to sign a bill of exceptions, such action being in the nature of appellate jurisdiction. *Ex parte Crane,* 5 Pet. 190, 193. In *Marbury* v. *Madison,* 1 Cranch 137, 175, it was held

that to warrant the issue of a mandamus by this court, in cases where original jurisdiction had not been conferred by the Constitution (see *Kentucky* v. *Dennison,* 24 How. 66, 97), it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable the court to exercise its appellate jurisdiction. *McClellan* v. *Carland,* 217 U. S. 268, 280, laid down the general rule applicable both to this court and to the circuit courts of appeals, that the power to issue the writ under R. S. § 716 is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that "where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below." See also *Delaware, L. & W. R. Co.* v. *Rellstab,* 276 U. S. 1, 5; *In re Babcock,* 26 F. (2d) 153, 155; *Barber Asphalt Paving Co.* v. *Morris,* 132 Fed. 945, 952–956.

Perhaps it would be enough to satisfy the test afforded by these decisions to point to the limited authority of this court under c. 2564, 34 Stat. 1246, U. S. C., Title 18, § 682 (U. S. C. Title 28, § 345) to exercise direct appellate jurisdiction to review a decision of the district court in the possible event that some action of that court might give rise to a right of review at the instance of the government. We prefer, however, to put our determination upon the broader ground that, even if the appellate jurisdiction of this court could not in any view be immediately and directly invoked, the issue of the writ may rest upon the ultimate power which we have to review the case itself by certiorari to the circuit court of appeals in which such immediate and direct appellate jurisdiction is lodged.

It is true this court has held that it was without authority to issue a writ of mandamus to the Supreme Court of the District of Columbia, because, since the creation of the Court of Appeals of the District of Columbia, this

court could not review the judgments and decrees of the supreme court of the district directly by appeal or writ of error. *In re Massachusetts,* 197 U. S. 482. And see also *In re Glaser,* 198 U. S. 171. Assuming that an application of those decisions to the present case would necessitate a denial of the writ, later cases clearly indicate that the rule as thus limited no longer obtains. In *McClellan* v. *Carland, supra,* p. 279, this court significantly suggested that it should be slow to reach a conclusion which would have the result of depriving the court of the power to issue the writ in proper cases to review the action of the federal courts inferior in jurisdiction to itself. And in *Ex parte Abdu,* 247 U. S. 27, 28, Mr. Chief Justice White, speaking for the court, said:

"The existence of ultimate discretionary power here to review the cause on its merits and the deterrent influence which the refusal to file must have upon the practical exertion of that power in a case properly made gives the authority to consider the subject which the rule presents."

This statement, it is true, related to the refusal of a circuit court of appeals to direct its clerk to file the record in an appeal from a district court; but it was followed broadly in *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701. In that case an application for mandamus was made to this court to compel a district court to hear a patent case, instead of referring it to a master, in alleged violation of Equity Rules 46 and 59. This court, after pointing out that the hearing of the cause in review would normally be had in the circuit court of appeals and could come here only in due course by certiorari, and saying that it was unnecessary to decide whether the writ would issue direct to the district court in matters as to which the circuit court of appeals would or should ordinarily have power to issue a mandamus to the same end in aid of its appellate jurisdiction, continued (p. 706):

"However that may be, we think it clear that where the subject concerns the enforcement of the Equity Rules which by law it is the duty of this Court to formulate and put in force, and in a case in which this Court has the ultimate discretion to review the case on its merits, it may use its power of mandamus and deal directly with the District Court in requiring it to conform to them. *Ex parte Abdu,* 247 U. S. 27, 28; *Ex parte Crane,* 5 Peters 190, 192, 193, 194. This is not to say that in every case where the Equity Rules are the subject of interpretation and enforcement in the District Court, such questions may as of course be brought here and considered in a direct proceeding in mandamus. The question of thus using the writ of mandamus would be a matter of discretion in this Court, and it would decline to exercise its power where the issue might more properly come up by mandamus in an intermediate appellate court or in regular proceedings on review. If it clearly appeared, however, that a practice had been adopted by district judges, as to the order or procedure in hearing causes, at variance with the equity rules, our writ might well issue directly to such judges."

In other, and readily distinguishable, cases where the direct appellate jurisdiction was vested in the circuit court of appeals, this court, in the exercise of its discretion, has declined to issue the writ and relegated the applicant to his remedy in that court. *Ex parte Apex Electric Mfg. Co.,* 274 U. S. 725; *Ex parte Daugherty,* 282 U. S. 809; *Ex parte Krentler-Arnold Hinge Last Co.,* 286 U. S. 533.

The rule deducible from the later decisions, and which we now affirm, is, that this court has full power in its discretion to issue the writ of mandamus to a federal district court, although the case be one in respect of which direct appellate jurisdiction is vested in the circuit court of appeals—this court having ultimate discretionary jurisdiction by certiorari—but that such power will be exercised only where a question of public importance is involved, or

where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken. In other words, application for the writ ordinarily must be made to the intermediate appellate court, and made to this court as the court of ultimate review only in such exceptional cases. That the present case falls within the latter description seems clear. The effect of the refusal of the district court to issue a warrant upon an indictment fair upon its face and properly found and returned is equivalent to a denial of the absolute right of the government, as matters stand, to put the accused on trial, since that cannot be done in his absence. The mere statement discloses the gravity and public importance of the question. It is obvious that if a like attitude should be taken by district courts generally, serious interference with the prosecution of persons indicted for criminal offenses might result. Undoubtedly, upon the theory presented by the government, mandamus is the appropriate remedy; and the writ may well issue from this court in order to expedite the settlement of the important question involved, and, incidentally, in furtherance of the general policy of a prompt trial and disposition of criminal cases. Accordingly, we pass to a consideration of the merits.

2. The theory of the court below is that its denial of the petition of the government for a bench warrant was an exercise of its judicial discretion, and, therefore, not reviewable by mandamus. This view of the matter cannot be sustained. The question whether there was probable cause for putting the accused on trial was for the grand jury to determine, and the indictment being fair on its face, the court to which it was returned, upon the application of the United States attorney, should have issued the warrant as a matter of course. Cases are cited said to be to the contrary, but they are not in point. They are either cases where the warrant was sought from a magistrate upon complaint in the absence of an indictment, or

was sought under the removal statute, R. S. § 1014, U. S. C., Title 18, § 591. Obviously, the first named cases are without application. In cases arising under the removal statute the indictment is produced and considered not as a basic pleading, but merely as evidence establishing or tending to establish the commission of the offense and which may or may not settle the question of probable cause. In the trial court to which the indictment has been returned it is "the very foundation of the charge." *Benson* v. *Henkel,* 198 U. S. 1, 12; *Morse* v. *United States,* 267 U. S. 80, 83; *Fetters* v. *United States,* 283 U. S. 638, 642.

It reasonably cannot be doubted that, in the court to which the indictment is returned, the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer. Compare *McGrain* v. *Daugherty,* 273 U. S. 135, 156–158; *Hale* v. *Henkel,* 201 U. S. 43, 60–62. The refusal of the trial court to issue a warrant of arrest under such circumstances is, in reality and effect, a refusal to permit the case to come to a hearing upon either questions of law or of fact, and falls little short of a refusal to permit the enforcement of the law. The authority conferred upon the trial judge to issue a warrant of arrest upon an indictment does not, under the circumstances here disclosed, carry with it the power to decline to do so under the guise of judicial discretion; or, as this court suggested in *Ex parte United States,* 242 U. S. 27, 42, the power to enforce does not inherently beget a discretion permanently to refuse to enforce. In *United States* v. *Thompson,* 251 U. S. 407, an order of a federal district court quashing an indictment on the ground that the charge, having been submitted to a previous grand jury, had been resubmitted to a later one without leave of court first obtained, was set aside. This court there said that the power and duty of the grand jury to investigate is original

and complete, and may be exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not exhausted or limited by adverse action taken by a previous grand jury, and that a United States district attorney may present, without leave of court, charges which a previous grand jury has ignored. The necessary effect of the district court's order, it was said (pp. 412–413), "was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power," and to bar the lawful authority of the United States attorney and of the grand jury "by the application of unauthorized judicial discretion." These observations are pertinent here.

Rule made absolute.

STEPHENSON ET AL. *v.* BINFORD ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 326. Argued November. 14, 15, 1932.—Decided December 5, 1932.

1. The highways of a State are public property, the primary and preferred use of which is for private purposes; their use for purposes of gain may generally be prohibited by the legislature or conditioned as it sees fit. P. 264.
2. Texas statute regulating carriers on highways, considered and *held* not open to the objection that it forces private carriers to assume the duties and burdens of common carriers. Pp. 265–269.
3. Unregulated use of the public highways by a vast and constantly growing number of private contract carriers operating motor trucks, had the effect of greatly decreasing the freight which would be carried by railroads within the State, and, in consequence, of adding to the burden upon the highways. *Held:*

(1) That the removal or reduction of this burden, with its resulting injury to the highways, interference with their primary use, danger and inconvenience, was a legitimate subject for the exercise of the legislative power. P. 271.

(2) Statutory provisions (a) forbidding private carriers to use the highways without permits, the issuance of which by a commission depends upon the condition that the efficiency of common-carrier service then adequately serving the same territory shall not be impaired; and (b) authorizing the commission to prescribe minimum rates for private carriers not less than those prescribed for common carriers for substantially the same service, are legitimate means for conserving the highways and do not infringe the right of the private carrier to due process. Pp. 272, 273.

4. The judgment of the legislature as to fitness and efficiency of means adopted by it for a legitimate end, must stand if it can be seen that, in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end; the legislative conclusion must be accepted by the courts if not manifestly wrong. P. 272.
5. When exercise of the freedom of contract conflicts with the power and duty of the State to safeguard its property from injury and preserve it for the uses for which it was primarily designed, such freedom may be regulated and limited to the extent that reasonably may be deemed necessary for the execution of such power and duty. P. 274.
6. A State has power to regulate not only the use of its highways but private contracts also, in so far as they contemplate that use; it may prescribe the terms upon which persons will be permitted to contract in respect of the use of the public highways for purposes of gain. P. 274.
7. If sustained by one constitutional purpose, a statute is not invalid because designed also for another purpose which, considered apart, the legislature had no power to effect. P. 276.
8. Contracts are made subject to the future exercise of the constitutional power of the State. *Id.*
9. Whether the provision of the Texas statute requiring private motor carriers to furnish bonds and insurance policies as security for payment for loss of, or injury to, property arising out of their operations, should be construed as applicable to the cargoes they themselves carry, will not be determined in the absence of any construction of it by the state courts and of any attempt to enforce it against the carriers complaining. P. 276.

10. Unless obliged to do otherwise, this Court should not adopt a construction of a state statute that might render it of doubtful validity, but should await determination of the matter by the state courts. P. 277.
11. The complaining carriers have not shown such construction or administration of the statute as produces undue discrimination against private carriers of their class as compared with carriers operating under special permits, or persons, commonly known as "shipper owners," who transport their own commodities. P. 277.

53 F. (2d) 509, affirmed.

APPEAL from a decree of the District Court of three judges denying a permanent injunction in a suit to restrain the Governor, and other officials, of the State of Texas from enforcing provisions of a statute regulating the use of the highways by carriers of freight by motor. The report cited above contains the opinion rendered by the District Court when it denied a temporary injunction.

Mr. John N. Crooker, with whom *Messrs. Wm. B. Bates* and *Leon Jaworski* were on the brief, for appellants.

Constitutional guaranties forbid changing by mere legislative fiat the status of a private contract carrier into that of a common carrier against his will.

For a business to be "affected with a public interest," it must be such "as to justify the conclusion that it has been devoted to a public use and its use thereby, in effect, granted to the public," and the term is not so yielding and flexible as to include the business of a private contract carrier, conducted pursuant to a single contract with one shipper.

Legislative declaration that a certain business is affected with a public interest does not establish it as being such, but the matter is one which is always open to judicial inquiry.

By providing (a) that no private contract carrier shall be given a permit to operate upon the highways if the Commission be of the opinion that the proposed opera-

tion of such carrier will impair the efficient public service of any authorized common carriers then adequately serving the same territory, and (b) that the Railroad Commission shall prescribe the rates such private contract carrier may charge for his services, which rates, in no event, shall be less than the rates prescribed for a common carrier performing substantially the same service—among other provisions—the legislature is attempting to regulate purely private business belonging to appellants, contrary to constitutional guaranties.

The legislature can not regulate the purely private business of appellants by attempting, as this Act does, to invest the Railroad Commission with power and authority to require appellants to file such monthly, annual or other reports and data as the Commission may deem necessary, and to require them to keep accounts strictly in accordance with such classification of accounts and rules as may be prescribed by said Commission. Nor can the legislature regulate appellants' business by requiring them to carry insurance to cover the cargo transported by them.

Permitting certain contract carriers, similarly situated to appellants, but engaged in hauling commodities other than those transported by appellants, to obtain special permits from the Railroad Commission without first having to comply with the provisions of the Act, is an arbitrary designation of part only of a general class, not based on anything having reasonable relation to the subject-matter of the Act.

To require private contract carriers to employ only such drivers as have passed a special examination and obtained a special chauffeur's license—to regulate the number of hours such drivers can operate trucks and the number of hours such drivers must rest—and to regulate the manner of loading the cargo, etc., of private contract carriers—all without placing the "shipper-owner" and others

situated exactly as appellants are situated under similar regulations, creates an arbitrary and unreasonable designation of part only of a comprehensive class, not based on anything having relation to the subject-matter of the Act.

Mr. LaRue Brown, with whom *Messrs. L. E. Blankenbecker* and *Horace P. Moulton* were on the brief; for D. A. Beard, intervener-appellant.

The provisions requiring a permit, fixing minimum rates, and requiring cargo insurance, are regulations of the private carrier's business. They are not regulations to conserve the highways.

By this enactment the State asserts power to impose competitive restrictions upon the business of the private carrier. They are sought to be supported by the asserted power for economic reasons to regulate that business. They constitute burdens and impose duties peculiar to public utilities generally.

For both private and common carriers the primary test of the statute is the adequacy or inadequacy of existing facilities. Common carriers are protected against competition from private carriers, and the rule does not work the other way. Highway conditions are to be considered in passing upon applications of the common carriers, but only competitive conditions in the case of private carriers.

The permit requirement is not designed as a highway protective measure or a highway traffic regulation. Cf. *Buck* v. *Kuykendall,* 267 U. S. 307.

The Commission is vested with authority to regulate the rates of contract carriers only when such carriers are operating in competition with common carriers. Precisely what constitutes competition within the contemplation of this section is not altogether clear. Here, as in the permit requirements, the single aim is the restriction

of competition between common and private carriers, not that between private carriers.

Judged by its necessary effect, the preconceived aim of the permit requirement of § 6 is that no private carrier shall contract with any shipper to whom adequate common-carrier facilities are available. When to this is added this highly artificial rate-fixing provision by which certificated common carriers are placed in a peculiarly advantageous competitive position as against such private carriers as may be able to procure permits, the outcome can only be that the private carrier will ultimately be regulated out of existence.

No extended argument is required to demonstrate that the regulation of rates is purely a regulation of business, finding no semblance of authority in the power to legislate for the preservation of the highways or safety in their use. See Brown & Scott, Regulation of the Contract Motor Carrier under the Constitution, 44 Harv. L. Rev. 530, 550–558. It is an interference with the freedom of contract, which may be imposed upon common carriers or upon businesses which due to peculiar circumstances of devotion to public use, virtual monopoly or inequality of bargaining power between producer and consumer, are affected by the public interest and have thus acquired the status of a public utility.

To the extent that the Act requires insurance of the shipper against loss of or damage to his property in transit, it bears no relation to public safety or order upon the highways, but attempts to invade the field of private contract between shipper and private carrier. It prevents the shipper from saving the cost of such insurance if he prefers to take the risk himself or to rely upon the financial responsibility of the carrier. It is clearly an unwarranted regulation of the private business both of the intervener and of his customer. *Louis* v. *Boynton*, 53 F. (2d) 471; *Continental Baking Co.* v. *Woodring*, 55

F. (2d) 347, affirmed, 286 U. S. 352; *Sprout* v. *South Bend*, 277 U. S. 163; *Barrett* v. *New York*, 232 U. S. 14; *Red Ball Transit Co.* v. *Marshall*, 8 F. (2d) 635; appeal dismissed without opinion, 273 U. S. 782; *Cobb* v. *Dept. of Public Works*, 60 F. (2d) 631.

The business of private carriage of this intervener can not, in view of the Fourteenth Amendment, be subjected to such regulation. *Michigan Public Utilities Commn.* v. *Duke*, 266 U. S. 570; *Frost* v. *Railroad Commn.*, 271 U. S. 583, and particularly *Smith* v. *Cahoon*, 283 U. S. 553 *Continental Baking Co.* v. *Woodring*, 286 U. S. 352 368, 369.

The business is not affected with a public interest. *Tyson* v. *Banton*, 273 U. S. 418; *Ribnik* v. *McBride*, 277 U. S. 350; *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *Michigan Public Utilities Commn.* v. *Duke*, 266 U. S. 570, 576. See also *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522; *Producers' Transportation Co.* v. *Railroad Commn.*, 251 U. S. 228; *Texoma Natural Gas Co.* v. *Railroad Commn.*, 59 F. (2d) 750. Robinson, The Public Utility Concept in American Law, 41 Hary. L. Rev. 277, 293–303. The familiar criterion of virtual monopoly is also inapplicable.

The *Frost* case is conclusive authority that the grant of the privilege of using the highways may not be conditioned upon the submission to regulations which would not be constitutional if directly imposed.

Mr. Elbert Hooper, Assistant Attorney General of Texas, with whom *Messrs. James V. Allred*, Attorney General, *T. S. Christopher*, Assistant Attorney General, *Claude Pollard, J. H. Tallichet, Charles C. Huff, W. M. Streetman*, and *A. L. Reed* were on the brief, for appellees.

The Act does not undertake to convert contract carriers into common carriers. It does not require them to devote their property to any different or greater public

use than that to which they have already voluntarily dedicated it. It does not require them to render any greater service than they have contracted to render. There is no taking of their property devoted to one use and declaring it devoted to another use. It leaves them entirely free to regulate their schedules, designate their territory and routes, select their contracts, and the traffic they choose to haul. It merely fixes reasonable conditions upon purely permissive uses appellants make of public property as a place of business. The Act is bottomed on the State's undoubted power to protect its highways and remove traffic hazards as well as its power and duty to foster and preserve a dependable transportation system for the whole people. The regulations of the Act, including the power to fix minimum rates, extend only to those phases of contract carrier operations which adversely affect the public welfare; they are reasonably related to the accomplishment of its valid purposes.

Transportation is the most important of the public services. Experience has demonstrated the absolute necessity of its regulation to preserve and protect the public interest. The business of contract carriage has grown to such enormous proportions within recent years that it threatens to destroy common-carrier transportation agencies. Its manner of operation has seriously affected the economic and industrial life of the people. Its unrestrained and unregulated use of public highways, together with its discriminatory rates and practices, have resulted in irreparable injury to the public welfare. Contract carriage has developed such a peculiar and intimate relationship to the public interest that the State's power to enforce the regulations of the Act is superimposed upon it. Appellants, and the class of contract carriers who are reached by the Act, are, under conditions now obtaining on the highways, engaged in a business which is affected with a public interest, and the reasonable regulation of

their rates and practices is essential for the protection of that interest.

The Act imposes substantially different schemes of regulation upon common and contract carriers, and there is a clear differentiation between the two classes. The burdens imposed upon contract carriers are less onerous than those applied to common carriers. It authorizes no greater regulation of appellants' business than is essential to protect the great public interest involved.

Section 6 (d) authorizing the issuance of special permits for the transportation of certain named commodities is not open to the construction that persons operating thereunder are not subject to regulation upon the same basis as appellants. A proper construction of the Act subjects special permit operators to every regulation applicable to appellants. This construction avoids their contention that the Act is discriminatory.

The Act is clearly severable; and if § 6 (d) is invalid, it, and not the Act, must fall.

The Act does not apply to persons transporting their own property in their own trucks. Its classifications are based upon the substantial differences of fact between persons making a constant and extensive use of highways in the business of hauling for hire and persons making only a limited and incidental use in the ordinary and usual pursuits of life. The distinctions are drawn upon differences in the manner and extent of those uses and there is a rational basis for them.

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought in the court below by Stephenson, one of the appellants, in which the other appellants intervened, against various officials of the State and counties of Texas, among them, the Governor, Attorney General, members of the State Highway Commission and of the

State Railroad Commission, to enjoin the enforcement of certain provisions of a state statute hereafter described. The appellants severally were engaged in transporting freight by means of motor trucks over the highways of the state, between certain cities located within the state, under private contracts made with various named shippers, which contracts, among other terms, fixed the rate to be charged for the transportation services. While these contracts were in force and in process of being performed, the state statute was passed, the effect of which, it is alleged, is to prohibit appellants from carrying out the terms, provisions and conditions of their contracts; to preclude them from transporting freight over the highways of the state under their contracts as private carriers to their great injury; and to subject them to criminal prosecutions. It is further alleged that an enforcement of the act will destroy the business of appellants, and unless restrained will cause them irreparable injury.

The following constitute the salient provisions of the act. Section 1 defines various terms used in the act. Section 3 provides that no common carrier of property for compensation or hire shall operate over the highways of the state without first obtaining a certificate of public convenience and necessity, and that no contract carrier shall thus operate without a permit so to do. Section 4 vests the railroad commission with authority to supervise and regulate the transportation of property for compensation or hire by motor vehicle on any public highway of the state; to fix maximum or minimum, or maximum and minimum, rates, fares and charges in accordance with the specific provisions of the act; to prescribe rules and regulations for the government of motor carriers, for the safety of their operations, and for other purposes; to require each driver to have a license pursuant to an examination as to his ability and fitness. By the same section the commission is given broad powers of supervision and

regulation in respect of matters affecting the relationship of the motor carriers and the shipping public, as may be necessary in the interest of the public; and also to supervise and regulate such carriers generally "so as to carefully preserve, foster and regulate transportation and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interests of the public." The railroad commission and the highway commission are directed to coöperate in respect of the condition of the public highways and their ability to carry existing and proposed additional traffic.

Section 5 contains various provisions relating to common carriers over the highways, and among other things requires them to have *certificates* of public convenience and necessity. Section 6 (a) provides that no motor carrier now operating as a contract carrier, or hereafter desiring to engage in so doing, shall operate until it shall have received a *permit* from the railroad commission which shall not be issued until the applicant has complied with the requirements of the act. Section 6 (c) directs that such permits shall be granted only after a hearing, and not if the commission be of opinion "that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory."

Section 6 (d) authorizes the railroad commission to issue special permits to persons desiring to transport for hire over the state highways livestock, mohair, wool, milk, and certain other commodities, upon such terms and under such regulations as may be deemed proper, having in mind the protection of the highways and the safety of the traveling public. Section 6aa gives the commission authority to prescribe rules and regulations governing the operation of contract carriers in competition with com-

mon carriers over the highways, and to prescribe minimum rates to be collected by such contract carriers " which shall not be less than the rates prescribed for common carriers for substantially the same service."

Section 6bb provides that no permit to operate as a contract carrier shall be granted to any person operating as a common carrier holding a certificate of convenience and necessity, and that no certificate of convenience and necessity shall be granted to any person operating as a contract carrier, and that no vehicle shall be operated by any motor carrier with both a permit and a certificate.

Section 13 requires all motor carriers to give bonds and insurance policies, which among other things shall provide that the obligor will pay judgments recovered against the motor carrier based on claims for loss or damages for personal injuries, or " loss of, or injury to, property occurring during the term of said bonds and policies and arising out of the actual operation of such motor carrier." The section contains a proviso directing the Commission not to require insurance covering loss of or damage to cargo in amount excessive for the class of service to be rendered by the carrier.

Section 22(b) is a broad declaration of policy. It declares that the business of operating as a motor carrier of property for hire along the highways of the state is one affected with the public interest. It further declares that the rapid increase of motor carrier traffic and the lack of effective regulation have increased the dangers and hazards on public highways and made more stringent regulations imperative to the end that the highways may be rendered safer for public use, the wear and tear upon them reduced, discrimination in rates eliminated, congestion of traffic minimized, the use of the highways for transportation of property for hire restricted to the extent required by the necessities of the general public, and the various transportation agencies of the state adjusted and

correlated "so that public highways may serve the best interest of the general public."

The case was heard by a statutory court consisting of three judges, under § 266 of the Judicial Code, U. S. C., Title 28, § 380, upon the pleadings and affidavits and other evidence. That court delivered an opinion and denied an interlocutory injunction. 53 F. (2d) 509. Later, and upon final hearing, the court made findings of fact and entered a decree denying a permanent injunction. The case comes here by appeal from that decree.

Appellants assail the statute upon the following grounds. (1) That as applied to appellants, all of whom are private contract carriers, the result of the statute is to compel them to dedicate their property to the quasi-public use of public transportation before they can operate their motors over the highways, and thus to take their property for public use without adequate compensation and to deprive them of their property without due process of law. In other words, the alleged effect of the statute is to convert the private carriers into common carriers by legislative fiat. (2) That the business of appellants is not affected with a public interest, and the provisions of the statute so declaring in terms, or in effect, constitute an attempt to deprive appellants of their property without due process of law, and to abrogate their right of private contract. (3) That the statute by requiring appellants to obtain a permit in the nature of a certificate of public convenience and necessity subjects them to other regulations before they can lawfully operate upon the highways, which regulations are not imposed upon other private carriers similarly situated, and thereby appellants are denied the equal protection of the laws. (4) That other regulations to which appellants are subjected are not made applicable to persons using the highways in transportation of their own commodities under substantially similar conditions,

and thereby appellants are denied the equal protection of the laws.

To these contentions appellees reply—(a) That the act does not undertake to convert the contract carriers into common carriers, or to require them to devote their property to any different or greater public use than that to which they have already voluntarily dedicated it, or to render any service beyond that which they have contracted to render, but merely fixes reasonable conditions upon the permissive use which they make of public property as a place of business. (b) That the act is bottomed upon the state's power to protect its highways and remove traffic hazards, as well as upon its power and duty to foster and preserve a dependable transportation system for the whole people. (c) That the contract carriers reached by the act are, under conditions now obtaining upon the highways, engaged in a business affected with a public interest, and the reasonable regulation of their rates and practices is essential for the protection of that interest. (d) That the act is not discriminatory in the particulars asserted by appellants.

First. It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit. *Packard* v. *Banton,* 264 U. S. 140, 144, and cases cited; *Frost Trucking Co.* v. *Railroad Comm.,* 271 U. S. 583, 592–593; *Hodge Co.* v. *Cincinnati,* 284 U. S. 335, 337; *Johnson Transfer & Freight Lines* v. *Perry,* 47 F. (2d) 900, 902; *Southern Motorways* v. *Perry,* 39 F. (2d) 145, 147; *People's Transit Co.* v. *Henshaw,* 20 F. (2d) 87, 89; *Weksler* v. *Collins,* 317 Ill. 132, 138–139; 147 N. E. 797; *Maine Motor Coaches* v. *Public Utilities,* 125 Me. 63, 65; 130 Atl. 866.

Putting aside the question whether the statute may stand against the attack made under the due process of law clause, upon the theory that appellants, by reason of their use of the public highways, are engaged in a business impressed with a public interest, and the question whether it may be justified on the ground that, wholly apart from its relation to highway conservation, it is necessary in order to prevent impairment of the public service of authorized common carriers adequately serving the same territory, we confine our inquiry to the question whether, in the light of the broad general rule just stated, the statute may be construed and sustained as a constitutional exercise of the legislative power to regulate the use of the state highways. Provisions of the statute assailed on the ground that they are not highway regulations and violate the due process of law clause are: the requirement that the private contract carrier before engaging in business must obtain a permit upon considerations relating to the effect of their competition upon existing common carriers; the provision authorizing the railroad commission to fix the minimum rates of such private carriers operating in competition with common carriers, which shall not be less than the rates prescribed for common carriers for substantially the same service; and the requirement, as appellants interpret the statute, that such private carriers must furnish cargo insurance policies and bonds.

We are of opinion that neither by specific provision or provisions, nor by the statute considered as a whole, is there an attempt to convert private contract carriers by motor into common carriers. Certainly, the statute does not say so. Common carriers by motor and private contract carriers are classified separately and subjected to distinctly separate provisions. By § 1 (h), the contract carrier is defined as "any motor carrier . . . . transporting

property for compensation or hire over any highway in this state *other than as a common carrier.*" It is difficult to see how the legislature could more clearly have evinced an intention to avoid an attempt to convert the contract carrier into a common carrier. It is true that the regulations imposed upon the two classes are in some instances similar if not identical; but they are imposed upon each class considered by itself, and it does not follow that regulations appropriately imposed upon the business of a common carrier, may not also be appropriate to the business of a contract carrier.

Appellants, in support of their contention, rely upon prior decisions of this court; but there is nothing in any of them, as a brief review will disclose, which requires us to hold that the legislation here under review compels private contract carriers to assume the duties and obligations of common carriers, or interferes with their freedom to limit their business to that of carrying under private contracts as they have been wont to do.

Michigan Commission v. *Duke,* 266 U. S. 570, dealt with a state law which expressly provided that all persons engaged in the transportation of persons or property for hire by motor vehicle upon the public highways of the state should be common carriers, and that all laws of the state regulating transportation by other common carriers should apply with equal force and effect to such common carriers. It was upon this *express* provision that this court based its holding (pp. 577-578) that it was beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, since that would be to take private property for public use without just compensation in violation of the due process of law clause of the Fourteenth Amendment.

Buck v. *Kuykendall,* 267 U. S. 307, and *Bush Co.* v. *Maloy,* 267 U. S. 317, were cases which dealt with state

statutes affecting interstate commerce and with discriminations relating thereto. No such questions are raised in respect of the application to appellants of the Texas statute now under consideration.

The question decided in *Frost Trucking Co.* v. *Railroad Commn.*, 271 U. S. 583, differs entirely from that here presented. There (p. 592) the California supreme court had construed a provision of the state statute which required the private contract carrier to obtain not a permit, as here, but a certificate of public convenience and necessity, before doing business over the state highways, as a condition obliging him to dedicate his property to the business of public transportation and to subject himself to all the duties and burdens imposed by the act upon common carriers. This court, in accordance with the settled rule, accepted that construction as binding and, in that view, said (p. 592):

". . . the case presented is not that of a private carrier who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier; but it is that of a private carrier who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the railroad commission. The certificate of public convenience, required by § 5, is exacted of a common carrier and is purely incidental to that status. The requirement does not apply to a private carrier *qua* private carrier, but to him only in his imposed statutory character of common carrier. Apart from that signification, so far as he is concerned, it does not exist."

On the contrary, the Texas statute in respect of permits deals exclusively with the private contract carrier, and requires the issue of the permit not to him in the imposed character of a common carrier, but in his actual character

as a private contract carrier. If the California statute requiring a certificate had been thus interpreted by the highest court of the state, the foregoing quotation clearly suggests that our decision might have been otherwise.

Smith v. *Cahoon*, 283 U. S. 553, dealt with a Florida statute indiscriminately applying to all who operated motor vehicles for compensation or as common carriers over public highways, and prohibiting such operation without a certificate of public convenience and necessity, application for which was to be accompanied by a schedule of tariffs. No certificate was valid unless a bond were given by the applicant for protection against injuries resulting from negligence, and for the protection of persons and property carried. The railroad commission was vested with authority to fix or approve rates, regulate service, prescribe methods of keeping accounts, etc. Schedules of rates were to be open to the public, and all alterations in tariffs were under the commission's control. The violation of any provision of the act was made a misdemeanor punishable by fine or imprisonment or by both. This court held that since the statute affixed the same conditions to all who applied for certificates, and embraced in those conditions a scheme of supervision and control which constitutionally could be applied only to common carriers, a private carrier for hire could not constitutionally be arrested under it for failure to procure a certificate or pay the tax required by the act. It further held that if the statute were regarded as intended to afford one constitutional scheme for common carriers and another for private carriers, it failed to define the obligations of private carriers with the certainty required of criminal statutes, and was, therefore, void; and that this defect was not removed by a decision of the state court declaring the provisions separable and that only those legally applicable to private carriers were intended to apply to them, without also deciding which provisions were so applicable. "No separate

scheme of regulation," we said (p. 563), " can be discerned in the terms of the Act with respect to those considerations of safety and proper operation affecting the use of highways which may appropriately relate to private carriers as well as to common carriers."

The vice of the statute was that all carriers for hire, whether public or private, were put upon the same footing by explicit provisions which could not be severed so as to afford one valid scheme for common carriers and another for private carriers, with the result that until the separability of these provisions should be determined by competent authority, they were void for uncertainty. In the Texas statute no such uncertainty exists. The provisions intended to be applicable to contract carriers are distinctly set forth and separately stated, plainly leaving for determination only the question whether such provisions or any of them, are invalid as so applied. *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 364.

We come, then, to consider the challenged provisions of the statute under review, in the light of their exclusive relation to contract carriers, unembarrassed by any previous ruling of this court. In view of the conclusions to which we shall come, it is not necessary to determine whether the operation of trucks for the transportation of freight under private contracts, carried into effect by the use of the public highways, is a business impressed with a public interest

There is ample support in the record for the following findings of the court below:

" The evidence shows there are 1,360,413 motor vehicles other than either common or contract carriers or commercial carriers of passengers registered for use on the highways of Texas, and that it is one of the purposes of the Legislature to make the use of the highways safer and more convenient for these private operators, involving incidentally either a lessening of commercial transporta-

tion on the highways, or such improvement in their character and practices as to effect the same result. In this connection, the Court finds that the provisions of the statute carried out in accordance with the declaration of purpose and the specific instructions therein will have the effect either of lessening commercial traffic on the highways, or, by bringing it under careful and adequate supervision, of making the use thereof by the very large number of owners and operators of private motor vehicles safer and more convenient.

"The increase of unregulated truck transportation over the highways had developed a difficult and perplexing public problem to the extent that the Governor of the State in his message to the Legislature called attention to the fact that the highways were being taken and badly used by motor vehicles engaged in the transportation of freight for hire.

"The number of contract carriers on the highways of Texas having rapidly grown, as elsewhere found, the business they conduct now exists as a very large factor in commercial transportation. The court finds that it is not the effect of one such carrier or a limited number thereof which produced the serious problem with which the Legislature of Texas purported to deal and has dealt, but it is the effect, in the aggregate, of such contract carriers that is important.

. . . . . .

"The inevitable result of the continuance of the enormous increase of so-called private carriers for hire and the continual decrease in the number of common carriers holding certificates of public convenience and necessity will be the practical disappearance altogether of common carriers from the roads.

"The Legislature has declared that all of the available carriage service, including common carriage by rail and road and contract carriage by road, are so interdependent

that the public may not continue to have a safe and dependable transportation system unless private carriers operating on the same roads with common carriers are brought under just and reasonable regulations bringing their service into relation with common carriers, and we find the evidence supports this finding.

"The requirement of the Texas statute under attack that contract carriers must have a permit with the prerequisites in the statute for such a permit, is reasonable, particularly in that this method enables the State to know who will use its highways and to more efficiently regulate such use. The permit system has immediate relation to the condition of the roads and bridges, congestion of the highways and the character of equipment to be used, which relates not only to the effect of the operations on business but also to the problem of safety and convenience in use of the highway.

"The experience of the Railroad Commission supports the Legislative declaration that unregulated contract carriers under the former law effectively prevents the primary purpose of fostering and conserving for the public welfare all commercial transportation on the highways which it has been the purpose of the laws of Texas, under rules of the Commission, to foster."

These and other findings and the evidence contained in the record conclusively show that during recent years the unregulated use of the highways of the state by a vast and constantly growing number of private contract carriers has had the effect of greatly decreasing the freight which would be carried by railroads within the state, and, in consequence, adding to the burden upon the highways. Certainly, the removal or amelioration of that burden, with its resulting injury to the highways, interference with their primary use, danger and inconvenience, is a legitimate subject for the exercise of the state legislative power. And that this was one of the chief ends sought

to be accomplished by the provisions in question, the record amply establishes.

The assailed provisions, in this view, are not ends in and of themselves, but means to the legitimate end of conserving the highways. The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature, and not to that of the courts. It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end. Compare *McCulloch* v. *Maryland,* 4 Wheat. 316, 409–410, 419, 421, 423; *Veazie Bank* v. *Fenno,* 8 Wall. 533, 549; *Legal Tender Cases,* 12 Wall. 457, 539–540, 541, 542, 543; Pomeroy, Constitutional Law, 9th ed., § 268a.

Turning our attention then to the provision for permits, it is to be observed that the requirement is not that the private contract carrier shall obtain a certificate of public convenience and necessity, but that he shall obtain a permit, the issue of which is made dependent upon the condition that the efficiency of common carrier service then adequately serving the same territory shall not be impaired. Does the required relation here exist between the condition imposed and the end sought? We think it does. But in any event, if the legislature so concluded, as it evidently did, that conclusion must stand, since we are not able to say that in reaching it that body was manifestly wrong. *Jacobson* v. *Massachusetts,* 197 U. S. 11, 30–31. Compare *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 395; *Zahn* v. *Board of Public Works,* 274 U. S. 325, 328. Debatable questions of this character are not for the courts, but for the legislature, which is entitled to form its own judgment. *Sproles* v. *Binford,* 286 U. S. 374, 388–389. Leaving out of consideration common carriers by

trucks, impairment of the railway freight service, in the very nature of things, must result, to some degree, in adding to the burden imposed upon the highways. Or stated conversely, any diversion of traffic from the highways to the railroads must correspondingly relieve the former, and, therefore, contribute directly to their conservation. There is thus a substantial relation between the means here adopted and the end sought. This is made plain by the *Sproles* case, *supra* (p. 394):

"The State has a vital interest in the appropriate utilization of the railroads which serve its people, as well as in the proper maintenance of its highways as safe and convenient facilities. The State provides its highways and pays for their upkeep. Its people make railroad transportation possible by the payment of transportation charges. It cannot be said that the State is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available. The use of highways for truck transportation has its manifest convenience, but we perceive no constitutional ground for denying to the State the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained and that the public should not be inconvenienced by inordinate uses of its highways for purposes of gain. This is not a case of a denial of the use of the highways to one class of citizens as opposed to another, or of limitations having no appropriate relation to highway protection."

What has just been said applies in the main to the other challenged provision authorizing the commission to prescribe minimum rates not less than those prescribed for common carriers for substantially the same service. This provision, by precluding the contract carriers from rendering service at rates under those charged by the railroad carriers, has a definite tendency to relieve the highways by

diverting traffic from them to the railroads. The authority is limited to the fixing of minimum rates. The contract carrier may not charge less than the rates so fixed, but is left free to charge as much more as he sees fit and can obtain. Undoubtedly, this interferes with the freedom of the parties to contract, but it is not such an interference as the Fourteenth Amendment forbids. While freedom of contract is the general rule, it is nevertheless not absolute but subject to a great variety of legitimate restraints, among which are such as are required for the safety and welfare of the state and its inhabitants. *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13, 22; *Atlantic Coast Line R. Co.* v. *Riverside Mills,* 219 U. S. 186, 202; *Chicago, B. & Quincy R. Co.* v. *McGuire, id.,* 549, 567, *et seq.; Baltimore & Ohio R. Co.* v. *Int. Com. Commn.,* 221 U. S. 612, 619. When the exercise of that freedom conflicts with the power and duty of the state to safeguard its property from injury and preserve it for those uses for which it was primarily designed, such freedom may be regulated and limited to the extent which reasonably may be necessary to carry the power and duty into effect. Compare *McLean* v. *Arkansas,* 211 U. S. 539, 545; *Miller* v. *Wilson,* 236 U. S. 373, 380; *Frisbie* v. *United States,* 157 U. S. 160, 165; *Highland* v. *Russell Car Co.,* 279 U. S. 253, 261; *Adkins* v. *Children's Hospital,* 261 U. S. 525, 546.

Here the circumstance which justifies what otherwise might be an unconstitutional interference with the freedom of private contract is that the contract calls for a service, the performance of which contemplates the use of facilities belonging to the State; and it would be strange doctrine which, while recognizing the power of the state to regulate the use itself, would deny its power to regulate the contract so far as it contemplates the use. "Contracts which relate to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the State." *Sproles* v. *Binford, supra,*

at pp. 390–391, and authorities cited. The principle that Congress may regulate private contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created, *Highland* v. *Russell Car Co., supra,* at p. 261, applies to a state under like circumstances.

An entirely different question was presented in the *Frost Trucking* case, *supra.* There, as we pointed out (pp. 591–592), the California act, as construed by the highest court of the state, was in no real sense a regulation of the use of the public highways. Its purpose was to protect the business of those who were common carriers in fact by controlling competitive conditions. Protection or conservation of the highways was not involved.* The condition which constrained the private contract carrier to become a common carrier, therefore, had no relation to the highways. In this view, the use of the highways furnished a purely unrelated occasion for imposing the unconstitutional condition, affording no firmer basis for that condition than would have been the case if the contract carrier were using a road in private ownership.

The Texas statute, on the contrary, rests definitely upon the policy of highway conservation, and the provision now under review is governed by the same principle as that which recognizes the authority of a state to prescribe the conditions upon which it will permit public work to be done on its behalf. Among such conditions it may prescribe that laborers employed by a contractor to do such work shall not be permitted to labor more than eight hours per day. *Atkin* v. *Kansas,* 191 U. S. 207. "It cannot be deemed a part of the liberty of any contractor," it is said at pp. 222–223, "that *he* be allowed to do public work in any mode he may choose to adopt,

* The California Supreme Court expressly said that the act "does not purport to be and is not in fact a regulation of the *use* of the highways." 197 Cal. 230, 244; 240 Pac. 26.

without regard to the wishes of the State. On the contrary, it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." See also *Ellis* v. *United States,* 206 U. S. 246, 256; *Heim* v. *McCall,* 239 U. S. 175, 191. It may be said with like force that it belongs to the state, " as master in its own house," to prescribe the terms upon which persons will be permitted to contract in respect of the use of the public highways for purposes of gain. See *Hodge Co.* v. *Cincinnati,* 284 U. S. 335, 337.

We need not consider whether the act in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid. *Ellis* v. *United States,* 206 U. S. 246, 256. Nor does it matter that the legislation has the result of modifying or abrogating contracts already in effect. Such contracts are to be regarded as having been made subject to the future exercise of the constitutional power of the state. *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 480, *et seq.; Union Bridge Co.* v. *United States,* 204 U. S. 364, 400; *Sproles* v. *Binford, supra,* at pp. 390–391.

The provision of § 13, requiring every motor carrier, whether operating under permit or certificate, to furnish a bond and policy of insurance conditioned that the obligor will pay, among other things, for loss of, or injury to, property arising out of the actual operation of the carrier, is construed by appellants as including car-

goes carried by them, and is assailed as a requirement bearing no relation to public safety, but as an attempt to condition the purely private contractual relationship between shipper and private carrier. It is said that the proviso which prohibits the commission from requiring insurance covering loss of, or damage to, *cargo* in an excessive amount requires the construction suggested. So far as appears no attempt yet has been made to enforce the provision against any of these appellants, and until that is done they have no occasion to complain. Moreover, no state court thus far has dealt with the question, and unless obliged to do otherwise, we should not adopt a construction which might render the provision of doubtful validity, but await a determination of the matter by the courts of the state. *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 186.

Second. The contention that the act, in certain particulars, denies appellants the equal protection of the laws requires only brief consideration. Section 6 (d), which authorizes the issue of special permits to persons engaged in the business of transporting certain named commodities upon such terms, conditions and restrictions as the railroad commission may deem proper, etc., is said to discriminate arbitrarily against carriers of commodities of a similar character, in that the selected carriers are not required to comply with many of the onerous provisions of the statute. It is by no means clear that such is the case, and it is asserted on behalf of appellees, and not disputed, that the Attorney General of the state, in an official opinion, has construed the provision to mean that persons operating under these special permits either as contract or common carriers are subject to the provisions of the act applicable to such carriers, and that this construction has been accepted by the railroad commission. There is nothing in the record to suggest that the provision has been otherwise applied. Appellants in this

regard, therefore, have no ground upon which to base a complaint.

Nor do we find merit in the further contention that the act arbitrarily discriminates against appellants because it does not apply to persons, commonly known as "shipper-owners," who are transporting their own commodities under substantially similar conditions. It is obvious that certain provisions of the statute, like that requiring the commission to fix minimum rates, can have no application to such owners. We are of opinion, from an examination of the act and the companion act which was upheld by this court in *Sproles* v. *Binford, supra,* that all provisions relating to contract carriers which are germane to shipper-owners are made applicable to them. In any event, it is not shown that the act thus far has been so administered as to result in any unlawful discrimination.

The decree of the court below is

Affirmed.

MR. JUSTICE BUTLER dissents.

BAINBRIDGE *v.* MERCHANTS & MINERS TRANSPORTATION CO.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 90. Argued November 17, 1932.—Decided December 5, 1932.

1. The provision in § 33 of the Merchant Marine Act that jurisdiction (meaning venue) of actions by seamen for personal injuries suffered in the course of their employment "shall be under the court of the district in which the defendant employer resides or in which his principal office is located," refers only to federal courts. P. 280.
2. Where such action is in a state court, venue is determined by the state law. *Id.*
3. U. S. C., Title 28, § 837, (c. 113, 40 Stat. 683) provides that courts of the United States, "including appellate courts," shall be open to seamen without payment of or security for fees or

costs in suits in their own name and behalf for wages or salvage and "to enforce laws made for their health and safety." *Held* that it applies to appellate proceedings in this Court, in a suit by a seaman for personal injuries, under § 33 of the Merchant Marine Act, which section is an amendment of the Seamen's Act. P. 281.

4. Statutes passed for the benefit of seamen should be liberally construed in the light of the policy of Congress to deal with seamen as a favored class. P. 282.

306 Pa. 204, reversed.

CERTIORARI* to review the affirmance of a judgment dismissing the action for want of jurisdiction.

Mr. Edwin J. McDermott, by leave of Court, argued the cause *pro hac vice* for petitioner. *Mr. McDermott* and *Mr. Thomas D. McBride* also filed a brief for petitioner.

Mr. Howard H. Yocum for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner brought this action in the Court of Common Pleas of Philadelphia County, Pennsylvania, to recover damages for an injury sustained by her as a member of the crew of a steamship operated by respondent. The action was brought under the Jones Act, § 33 of the Merchant Marine Act of 1920, U. S. C., Title 46, § 688, which provides: "Jurisdiction [1] in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Respondent, contending that the court in which the action was brought was not of the proper district, since respondent's principal office was in Baltimore, Maryland, moved to dismiss the action for want of jurisdiction. The motion

* See Table of Cases Reported in this volume.

[1] Meaning venue, *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 384–385.

was sustained, and the action accordingly dismissed. The judgment of dismissal was affirmed by the state supreme court. 306 Pa. 204; 159 Atl. 19.

The question presented for our determination is whether the quoted provision in respect of jurisdiction applies to the state courts, or is limited to the federal courts. The decisions are conflicting, but we think the correct construction of the provision limits it to the courts of the United States. The word "district" is peculiarly apposite in that relation; but in order to apply it to a state court, whose territory for venue purposes may or may not be designated as a "district," an elasticity of interpretation would be required which it does not seem probable Congress had in mind. Thus in one instance, where an action had been brought in a state court, it was found necessary, in order to hold the provision applicable, to interpret the word "district" as meaning "county" in which the defendant resides or has his principal office. *Wienbroer* v. *U. S. Shipping Board E. F. Corp.*, 299 Fed. 972. The contrary view limiting the provision to the federal courts, which we approve, is expressed in *Lynott* v. *Great Lakes Transit Corp.*, 202 App. Div (N. Y.) 613, 619; 195 N. Y. S. 13 (affirmed without opinion, 234 N. Y. 626; 138 N. E. 473); *Patrone* v. *Howlett*, 237 N. Y. 394, 397; 143 N. E. 232; *Rodrigues* v. *Transmarine Corp.*, 216 App. Div. (N. Y.) 337, 339; 215 N. Y. S. 123; and *State ex rel. Sullivan* v. *Tazwell*, 123 Ore. 326, 330; 262 Pac. 220. Compare *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 384–385; *Engel* v. *Davenport*, 271 U. S. 33, 37–38. If the question were more doubtful than we think it is, we should be slow to impute to Congress an intention, if it has the power,[2] to interfere with the statutory provisions of the

[2] See and compare *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 148–149; *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211, 221; *Second Employers' Liability Cases*, 223 U. S. 1, 56–57; *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 387–388;

various states fixing the venue of their own courts. It follows that the venue should have been determined by the trial court in accordance with the law of the state.

Another question has been raised which, however, affects only the proceedings in this court. The Clerk was requested by counsel for petitioner to docket the case here under c. 113, 40 Stat. 683, U. S. C., Title 28, § 837, which provides:

"Courts of the United States, including appellate courts, hereafter shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety."

The Clerk, being in doubt, required a deposit to secure his fees and costs, and accordingly this was made by counsel for petitioner.

In *Ex parte Abdu,* 247 U. S. 27, it was held that the corresponding provision then in force (c. 27, 40 Stat. 157) did not apply to appellate proceedings; but the words which now appear, "including appellate courts," were not in the provision as it then read. That case, therefore, is not in point. With these words added, the provision now applies to appellate proceedings.

A more serious question is whether suits under the Jones Act may be regarded as suits by seamen "for wages or salvage" or "to enforce laws made for their health and safety." Such a suit is not for wages or salvage. Is it to enforce a law made for the health or safety of seamen? In *The Bennington,* 10 F. (2d) 799, the question was an-

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Calder v. *Bull,* 3 Dallas 386, 387; *Ex parte Crandall,* 52 F. (2d) 650, 654 (affirmed, 53 F. (2d) 969); *Southern Ry. Co.* v. *Cochran,* 56 F. (2d) 1019, 1020; *First National Bank* v. *Morgan,* 132 U. S. 141, 145; *Doll* v. *Chicago Great Western R. Co.,* 159 Minn. 323, 324–325; 198 N. W. 1006.

swered in the negative. In *Grant* v. *U. S. Shipping Board E. F. Corp.*, 24 F. (2d) 812, it was answered in the affirmative. The court in the latter case rejected the construction put upon the provision by the decision in *The Bennington* as too narrow and not in accord with the liberality Congress intended toward seamen, holding that the Jones Act, being an addition to the Seamen's Act, was intended to be consistent with the spirit of that legislation, which was directed to promote the welfare of American seamen. We agree with that view. The Jones Act is an amendment to § 20 of the Seamen's Act. The Jones Act has the effect of bringing into the maritime law, for the benefit of seamen, all appropriate statutes relating to employers' liability for the personal injury or death of railway employees. Both acts are to be treated as part of the maritime law. *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 389. Seamen have always been regarded as wards of the admiralty and their rights, wrongs and injuries a special subject of the admiralty jurisdiction. Benedict's Admiralty, 4th ed., §§ 182, 603. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class. *Robertson* v. *Baldwin*, 165 U. S. 275, 287. In the light of and to effectuate that policy, statutes enacted for their benefit should be liberally construed. The Seamen's Act, which includes the Jones Act by amendment, is entitled in part "An act to promote the welfare of American seamen . . . and to promote safety at sea." Chap. 153, 38 Stat. 1164. It requires little if any aid from the doctrine of liberal construction to enable us to say that the present suit is one to enforce a law made for the safety of seamen. Petitioner will not be required to prepay or make deposit to secure fees or costs, and the Clerk will be directed to refund the deposit already made.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

ADVANCE-RUMELY THRESHER CO., INC., *v.* JACKSON.

APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA.

No. 33. Argued November 10, 1932.—Decided December 5, 1932.

1. In determining the validity of a legislative declaration that a contract is contrary to public policy, regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting and that it is only where enforcement conflicts with dominant public interests that one who has had the benefit of performance by the other party to a contract will be permitted to avoid his own promise. P. 288.
2. Upon the sale of a machine for cutting and threshing the buyer's grain in a single operation, there is an implied warranty under the Uniform Sales Act, adopted in North Dakota, that the machine is reasonably fit for that purpose. P. 288.
3. A North Dakota statute provides that the purchaser of harvesting or threshing machinery for his own use shall have a reasonable time after delivery for inspecting and testing it and that, if it does not prove to be reasonably fit for the purposes for which it was purchased, he may rescind. It further declares any agreement contrary to its provisions to be against public policy and void, thus preventing waiver of the warranty of fitness. In a case involving the sale of a harvesting and threshing machine it is *held*, in view of conditions in the State to which the statute was addressed, that it does not violate the due process or the equal protection clause of the Fourteenth Amendment. Pp. 289–292.

62 N. D. 143; 241 N. W. 722, affirmed.

APPEAL from a judgment affirming a judgment against the thresher company, entered upon demurrer to its answer, in a suit against it to cancel promissory notes following the rescission of a contract of sale.

Mr. Howard G. Fuller, with whom *Mr. Matthew W. Murphy* was on the brief, for appellant.

The effect of the Act is to burden the business of appellant with serious financial loss, impair the value of its commodities held or acquired for sale, and arbitrarily

deprive appellant of valuable rights of contract. It opens to controversy and to possible repudiation by the buyer the plain and unqualified terms of the sale, to which the parties agreed. What article is or is not fit for the purpose of the purchase is made a jury question. As North Dakota is exclusively agricultural, a jury there will naturally see the question of fitness from the standpoint of the buyer. There is no standard of law to go by. The question of fitness becomes a question whether the machine would harvest grain or thresh grain, under the peculiar physical conditions which the buyer had in mind. A single defective part could render the machine unfit for the purpose of purchase, in the view of a jury, though the part might, under reasonable contract, be replaced almost instantly and without any loss to the buyer.

The evil sought to be remedied was not the financial harm or loss caused by the sale of unfit commodities; it was the damage caused by fraudulent sales. A legislative declaration or implication that the fact of unfitness is conclusive evidence of fraudulent sale is unreasonable and unconstitutional where, as in this case, it would deprive the seller of a right to disprove fraud; or where the result is to convict and penalize a person for a wrong of which he is blameless. *Heiner* v. *Donnan*, 285 U. S. 312; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35.

This statute, as a remedy for the evil of fraud, is inappropriate, arbitrary and unreasonable. There is no attempt to regulate or supervise sales; nor to prohibit sales of unfit articles. The remedy given the buyer bears no relation whatever to the particular evil at which the statute is said by the state court to be aimed.

The purchaser here was a dealer in farm implements. It is a fair inference that he was in no position to be victimized. He contracted to waive all warranties and

remedies for their breach in express consideration of a reduction of the purchase price.

An act of the legislature which gives to a buyer of a commodity the full financial benefit of a procedural remedy for fraud, in the sale thereof, where there was no fraud—taking from the seller the cost of this financial gratuity to the buyer—violates the due process clause of the Fourteenth Amendment.

The discrimination of this law in favor of a certain part of the class of persons who buy the described commodities is unreasonable, and no state of facts can be conceived to sustain it. If, as explained by the court below, persons who negligently or unwisely sign contracts not for their best interests are the class intended to be benefited, there is no rational theory for limiting that class to those who buy these particular commodities; and no reasonable basis for expanding that class to all persons who buy any of these commodities. It is unreasonable and discriminatory to impose the burden of the Act on those only who sell such commodities to buyers who do not preserve their right of warranty.

It is true the court below refers to the need of testing harvesting machinery in harvesting time and threshing machinery in threshing season. But in so far as this statement alludes to a classification of persons affected by the Act, it fails to furnish any rational support for the classification actually made. This need of test within a limited space of time is related by the court only to harvesting and threshing machinery. The statement of the necessities of the buyer is not claimed to have reference to gas or oil-burning tractors or gas or steam engines.

The business of selling the commodities in question is not so charged with a public use or interest that the regulation in question is justified. *New State Ice Co.* v. *Liebmann,* 285 U. S. 262.

Mr. William Lemke for appellee.

It is merely a necessary regulation to prevent fraud and misrepresentation in the sale of that class of farm machinery enumerated in Chapter 238 of the Laws of 1919. It does not deprive appellant of property, but compels it to be honest with the purchaser and to sell him only that class of machinery which is reasonably fitted for the purpose for which it was purchased.

The Fourteenth Amendment has never been held a protector of fraud to the extent of permitting high-pressure salesmen to sell to farmers farm machinery not reasonably fitted for the purpose for which it was purchased. To prevent one from perpetrating a fraud is not to deprive him of property within the meaning of the Fourteenth Amendment. That Amendment does not guarantee to a citizen the right to contract, either by himself or agent, within his State, in violation of its laws. *Hooper* v. *California,* 155 U. S. 648. Nor does it give immunity from reasonable regulation to safeguard the people's interest. *Miller* v. *Wilson,* 236 U. S. 373; *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13. The regulation of trade, business or profession is within the domain of the police power; such regulation may more or less restrict liberty or impair the value of property, but if reasonably calculated to produce the end contemplated is constitutional. *Soon Hing* v. *Crowley,* 113 U. S. 703; *Gundling* v. *Chicago,* 177 U. S. 183; *Nutting* v. *Massachusetts,* 183 U. S. 553. A statute prohibiting a stipulation against liability for negligence in the delivery of an interstate message is not invalid as a deprivation of liberty to contract. *Western Union* v. *Commercial Milling Co.,* 218 U. S. 406.

Mr. Justice Butler delivered the opinion of the Court.

By this appeal we are called on to decide whether as construed below a statute of North Dakota, c. 238, Laws

1919, is repugnant to the due process or equal protection clause of the Fourteenth Amendment. It declares:

"Sec. 1. Reasonable Time to Discover Defects. Any person, firm or corporation purchasing any gas or oil burning tractor, gas or steam engine, harvesting or threshing machinery for their own use shall have a reasonable time after delivery for the inspection and testing of the same, and if it does not prove to be reasonably fit for the purpose for which it was purchased the purchaser may rescind the sale by giving notice within a reasonable time after delivery to the parties from whom any such machinery was purchased, or the agent who negotiated the sale or made delivery of such personal property or his successor, and placing same at the disposal of the seller.

"Sec. 2. Provisions Contrary to Preceding Section Void. Any provision in any written order or contract of sale, or other contract which is contrary to any of the provisions of this Act is hereby declared to be against public policy and void."

The complaint of appellee, plaintiff below, shows the following facts. August 13, 1928, defendant, in consideration of $1,360 to be paid by plaintiff according to his three promissory notes given therefor, sold and delivered to the latter a harvester-combine to be used for the cutting and threshing in a single operation of grain raised by him. Plaintiff undertook by means of the machine so to cut and thresh his crop, but upon a fair trial and test he found that it was defective and could not be used or made fit to operate for the purpose. September 5, he rescinded the sale in the manner prescribed by the statute. His notes remained wholly unpaid. He prayed judgment that defendant return them to him for cancellation. The answer, asserting that the statute is repugnant to the due process and equal protection clauses, does not deny the complaint but avers that plaintiff gave defendant a written order by which he waived all warranties, express,

implied or statutory, and unconditionally promised to pay the price represented by the notes. Plaintiff demurred. The trial court sustained the demurrer and, defendant having elected to stand on its answer, gave plaintiff judgment in accordance with the prayer of the complaint. The supreme court affirmed. 62 N. D. 143; 241 N. W. 722.

On the facts alleged in the complaint, § 15 (1) of the Uniform Sales Act, Laws 1917, c. 202, implied a warranty by defendant that the machine was reasonably fit in a single operation to cut and thresh plaintiff's grain. *Allis-Chalmers Mfg. Co.* v. *Frank,* 57 N. D. 295, 299; 221 N. W. 75. But it left plaintiff free to waive such warranty and to purchase on the terms referred to in the answer. § 71. *Minneapolis Threshing Mach. Co.* v. *Hocking,* 54 N. D. 559, 569; 209 N. W. 996.

The question is whether the challenged enactment of 1919 may prohibit such waivers as contrary to public policy and void, and so limit the right of seller and purchaser to contract. While that right is a part of the liberty protected by the due process clause, it is subject to such restraints as the State in the exertion of its police power reasonably may put upon it. But freedom of contract is the general rule and restraint the exception. The exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. *Adkins* v. *Children's Hospital,* 261 U. S. 525, 545, 546 and cases cited. In determining the validity of a legislative declaration that a contract is contrary to public policy, regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting and that it is only where enforcement conflicts with dominant public interests that one who has had the benefit of performance by the other party to a contract will be permitted to avoid his own promise. Cf. *Steele* v. *Drummond,* 275 U. S. 199, 205. *Twin City Co.* v. *Harding Glass Co.,* 283 U. S. 353, 356.

The object sought to be attained by the statute under consideration is to protect farmers in an agricultural State against losses from investments in important machines that are not fit for the purposes for which they are purchased and to guard against crop losses likely to result from reliance upon such machines. It applies only to sales made to purchasers requiring for their own use the relatively complicated and costly implements referred to in § 1. These are used on farms producing grain, and the raising of such crops is North Dakota's principal industry. Enormous quantities of farm machinery are required in that State, and expenditures therefor constitute a large part of the total investment in farm land and equipment. Most, if not all, of the tractors, engines, harvesters and threshers referred to are made outside North Dakota by a few manufacturers who, through their agents or dealers, sell them directly to farmers. Forms of sales contracts generally used are prepared by sellers and, as pointed out in the opinion of the state supreme court, the tendency has been to restrict the rights of purchasers and to lessen the liability of sellers. Such machines can properly be tested only during seasons in which they are used and, especially in the case of harvester and thresher combines, these periods are short. The machine sold to plaintiff is a gas and oil-burning harvester and thresher combine. Machines designed for such purposes are necessarily complex and even under favorable conditions their effective use requires skill, experience and resourcefulness on the part of operators. In determining whether they are reasonably suitable and fit for the purposes intended, there is involved a consideration of the kind and condition of the crops to be harvested, the periods during which they remain recoverable after becoming sufficiently ripe and dry to be contemporaneously cut and threshed, the amount and kind of weeds and other foreign vegetation growing with the grain, the topography of the fields, and the rainfall,

dew and humidity. Such combines have not been long known or much used in the grain-raising Northwest, and undoubtedly there are ample grounds for a legislative finding that the farmers of North Dakota as a class are not sufficiently familiar with them to be able, without actual test, to form an intelligent opinion as to their fitness to cut and thresh in a single operation or whether they safely may be regarded as dependable for use on their farms. If they were relied on generally in that State and should fail in the fields, the resulting losses would be of such magnitude and public concern as to warrant the adoption of measures calculated to guard against them.

The regulation imposed seems well calculated to effect the purposes sought to be attained. The evils aimed at do not necessarily result from misrepresentation or any fraud on the part of sellers, and at least one of the purposes of the legislation is to lessen losses resulting from purchasers' lack of capacity, without opportunity for inspection and trial, to decide whether the machines are suitable. The statute prevents waiver of the warranty of fitness implied by the state law. Such warranties tend to restrain manufacturers from selling unfit or defective machines and also from selling any—even those of appropriate design and construction for operation in some regions—for use in places or under conditions not permitting effective service. And the right of inspection, test and rescission that the statute assures to purchasers enables them, free from peril of serious mistakes, deliberately to consider whether such machines are reasonably suitable or fit for the purposes for which they want to use them. There is nothing in this case to suggest that, under the guise of permissible regulation, the State unreasonably deprives sellers of such machines of their right freely to contract or that in its practical operation the statute arbitrarily burdens their business. *Burns Baking Co.* v. *Bryan,* 264 U. S. 504. *Weaver* v. *Palmer Bros. Co.,* 270

U. S. 402. The State, in order to ameliorate the evils found incident to waivers of implied warranties of fitness, merely declares that such agreements in respect of the sale of the designated machines are contrary to public policy and holds the parties to the just and reasonable rule prescribed by § 15 (1) of the Sales Act. Upon the question of due process more need not be said.

The character of the machines, the need of tests to determine their fitness, the serious losses that ensue if in actual use they prove unfit, and the other considerations alluded to plainly warrant the classification and special regulation of sales prescribed by the statute.

We find no substantial support for the contention that the statute complained of violates the due process or equal protection clause of the Fourteenth Amendment. *Frisbie* v. *United States,* 157 U. S. 160, 165. *Orient Insurance Co.* v. *Daggs,* 172 U. S. 557, 563, *et seq. Patterson* v. *Bark Eudora,* 190 U. S. 169, 173. *Whitfield* v. *Aetna Ins. Co.,* 205 U. S. 489, 495. *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 564, *et seq. National Union Ins. Co.* v. *Wanberg,* 260 U. S. 71.

Judgment affirmed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO concur in the result.

SUN OIL CO. *v.* DALZELL TOWING CO., INC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 38. Argued November 16, 1932.—Decided December 5, 1932.

1. A towage company, in performing a contract to assist a vessel propelled by her own power and manned by her officers and crew, is neither common carrier nor bailee, and is not subject to the rule that prevents common carriers, and others under like duty to serve the public, from escaping by agreement liability for damage caused by their negligence. P. 294.

2. In a contract merely to furnish tugs to assist a vessel while using her own propelling power, it may validly be stipulated that the tug captains, when they board the vessel, shall become the servants of her owners, so that for damage resulting from their orders in piloting the vessel the owners of the tugs shall not be liable. P. 294.

55 F. (2d) 63, affirmed.

CERTIORARI, 286 U. S. 538, to review a decree affirming a decree dismissing a libel in a suit in admiralty. For opinion of the District Court, see 48 F. (2d) 598.

Mr. Frank A. Bull, with whom *Messrs. O. D. Duncan* and *Russell T. Mount* were on the brief, for petitioner.

Mr. Chauncey I. Clark for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit in admiralty brought by petitioner in the southern district of New York against respondent and three steam tugs, Dalzellite, W. F. Dalzell, and Fred B. Dalzell, Jr., to recover damages alleged to have been caused by their negligence to petitioner's tank steamer Sabine Sun. The court dismissed the libel. 48 F. (2d) 598. Petitioner appealed from so much of the decree as dismissed the libel as to the towing company. The Circuit Court of Appeals affirmed. 55 F. (2d) 63.

Respondent operates steam tugboats in and about New York harbor. May 14, 1925, in anticipation of the arrival of the Sabine Sun, Turnbull, petitioner's assistant marine superintendent, arranged by telephone to have respondent send tugs to take her through waters leading to Newark Bay and to a dock at Bergen Point, New Jersey. There was no writing or formal contract concerning the service to be rendered. The agreement pieced out from the oral order and acceptance and prior like transactions between the parties included as one of its terms the following clause: "When the captain of any

tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom."

On the next day the tanker anchored off Stapleton, Staten Island. The W. F. Dalzell came alongside and Bennett, her captain, went on board and acted as pilot. Using her own power and accompanied by the tug she got under way. The Dalzellite joined them off St. George and thence the three vessels went on through the Kill van Kull. Off Port Richmond the Fred B. Dalzell, Jr. became part of the flotilla. Fort, her captain, then went upon the tanker and acted as pilot, relieving Bennett. The tanker's captain, his third officer, a quartermaster and Turnbull were also there. She continued on her way using her own propelling power and assisted by the tugs. When rounding Bergen Point she went aground outside the channel, and it was then, as alleged in the libel, that she sustained the damages for which petitioner seeks to recover. She was backed off the obstruction, turned into the channel and without other mishap taken to the dock.

In view of petitioner's failure to appeal from the dismissal as to the tugs, we must assume that as to them petitioner failed to make out its case and that the stranding of the tanker was not in whole or in part due to any fault of theirs. It was not shown that respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power. Her master, officers and crew were at their stations, and her propelling power and steering apparatus were used to bring her to destination. And if the pilotage clause is

valid, the tug captains while on board the tanker and respectively acting as her pilot were for that turn the servants of petitioner and the respondent may not be held responsible for any act or omission of theirs during the period of that service.

The validity of its applicable provision cannot reasonably be doubted. So far as concerns the service to be rendered under the agreement, respondent was not a common carrier or bailee or bound to serve or liable as such. Towage does not involve bailment, and the services covered by the contract were less than towage. *Stevens* v. *The White City,* 285 U. S. 195, 200. There is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their capacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence. *Railroad Co.* v. *Lockwood,* 17 Wall. 357. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 440. Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept the terms of respondent's pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length. "There is no rule of public policy which denies effect to their expressed intention, but on the contrary, as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made." *Santa Fe, P. & P. Ry. Co.* v. *Grant Bros. Co.,* 228 U. S. 177, 188.

Respondent's responsibility is not to be extended beyond the service that it undertook to perform. It did not furnish pilotage. The provision that its tug captains while upon the assisted ship would be the servants of her

owner is an application of the well-established rule that when one puts his employee at the disposal and under the direction of another for the performance of service for the latter, such employee while so engaged acts directly for and is to be deemed the employee of the latter and not of the former. *Denton* v. *Yazoo & M. V. R. Co.*, 284 U. S. 305, 308. It would be unconscionable for petitioner upon occurrence of a mishap to repudiate the agreement upon which it obtained the service.

The decree under consideration is not in conflict with the decisions of this court cited by petitioner, *The Steamer Syracuse*, 12 Wall. 167, and *Compañia de Navegacion* v. *Ins. Co.*, 277 U. S. 66. Neither involved an agreement similar to the provisions of the pilotage clause on which this case turns.

Decree affirmed.

DETROIT INTERNATIONAL BRIDGE CO. *v.* CORPORATION TAX APPEAL BOARD OF MICHIGAN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 51. Argued November 11, 1932.—Decided December 5, 1932.

1. One who challenges the constitutionality of a statute has the burden of establishing the facts on which he asserts its invalidity. P. 297.
2. The question whether the operation of a toll bridge between a State of this country and Canada is foreign commerce, so that a corporation engaged therein may not be subjected to a state excise on the right to do business, will not be considered where the corporation failed to establish that it has no power to carry on business that is not within the protection of the commerce clause. P. 297.

257 Mich. 52; 240 N. W. 68, affirmed.

APPEAL from a judgment sustaining a determination of a corporation privilege tax.

Mr. Victor W. Klein, with whom *Messrs. Alfred A. Cook* and *Thomas G. Long* were on the brief, for appellant.

Mrs. Alice E. Alexander, with whom *Mr. Paul W. Voorhies,* Attorney General of Michigan, was on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

Appellant is a Michigan corporation engaged in operating the international bridge spanning the river between Detroit and Sandwich, Ontario. Acting under Act No. 85 of 1921, as amended by Act No. 175 of 1929, the secretary of state calculated, and appellee confirmed his determinations, that appellant was liable for a license fee tax of $3,000 for 1929 and $2,935.95 for 1930. Appellant obtained a review in the state supreme court and there maintained, as it still insists, that by its articles of association its powers are limited to constructing, owning, maintaining and operating the bridge for the use of traffic and to taking tolls therefor, that in 1930 it was engaged exclusively in foreign commerce and that the statute, construed to impose a fee for the privilege of doing that business, violates the commerce clause. The bridge was under construction during a part of 1929, and no question is here presented as to the fee for that year. The court overruled appellant's contention and, except as to an item not now material, entered judgment affirming the determination of the fees. 257 Mich. 52; 240 N. W. 68.

The sole question is whether as construed the state law violates the commerce clause.

The statute, § 4, declares that every corporation, excepting certain companies that need not be named, organized under the laws of the State "shall . . . for the privilege of exercising its franchise and of transacting its

business within this state, pay to the secretary of state an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privileges of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

In *In re Detroit Properties Corp.,* (1931) 254 Mich. 523; 236 N. W. 850, the state supreme court held (p. 525): "The privilege fee is an excise tax, not upon the right to be a corporation, but upon the activities of the corporation in the exercise of its corporate franchise, or, as it is sometimes expressed, upon the franchise 'to do,' not upon the franchise 'to be.' . . . Actual transaction of business by a domestic corporation is not a condition of the tax. It is imposed on the right to transact." And this court follows that construction. *Michigan* v. *Michigan Trust Co.,* 286 U. S. 334, 342.

Appellee insists that to own and operate the bridge and take tolls for its use does not involve intercourse between Michigan and Ontario and that therefore appellant is not engaged in foreign commerce and further maintains that appellant has power to engage in business other than the operation of the bridge. We do not consider whether appellant is engaged in foreign commerce for we are of opinion that it has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause. *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 448.

Appellant has the burden to establish the facts on which it asserts the invalidity of the statute. *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, 410. The record contains only

a part of the third article of its articles of association: "The purpose or purposes of this corporation are as follows: To construct, own and/or operate a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches thereto; To maintain and operate such bridge and the approaches thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

Appellant asserts that its powers are solely limited to these purposes. But appellee in its brief brings forward the entire article, containing in its final paragraph a specification of power that is not limited, incident or appurtenant to the authority to construct, maintain and operate the bridge: "This corporation may maintain offices or agencies, conduct its business or any part thereof, purchase, lease or otherwise acquire, hold, mortgage, convey and assign real or personal property, and do all or any of the acts herein set forth, outside of the State of Michigan as well as within said State." It is clear that in addition to general power to own and operate the bridge and to do all that is related to that enterprise, appellant is by the last quoted provision empowered, as contended by appellee, to carry on the business of buying and selling real and personal property within the State of Michigan and elsewhere.

Indeed, appellant did not at first claim that its powers and activities are limited to foreign commerce. On the contrary it sent to the secretary of state with its annual report of 1929 the prescribed minimum fee of $10 and with that of 1930 the sum of $145.92. It did not then construe the Act as not applicable to any business within the scope of its authorization under its articles and the laws of the State, but merely that it was not liable for as much as the state taxing authorities laid against it.

Judgment affirmed.

MURPHY OIL CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 80. Argued November 18, 1932.—Decided December 5, 1932.

1. Under the Revenue Act of 1918, bonus and royalties received by the lessor under an oil lease, are taxable, after making the allowed deductions, as income. *Burnet* v. *Harmel, ante,* p. 103. P. 301.
2. The bonus and royalties paid the lessor both may involve return of capital investment in oil in the ground. P. 302.
3. A distinction between royalty and bonus, which would allow a depletion deduction on the former but tax the latter in full as income, when received, making no allowance for reasonably anticipated production of oil on the leased premises, would deny the "reasonable allowance for depletion" provided by § 234 (a) (9) of the Revenue Act of 1918. P. 302.
4. Article 215 of Treasury Regulations 45, as amended November 13, 1926, provides that when the lessor receives a bonus in addition to royalties, under an oil lease, there shall be allowed as a depletion deduction in respect of the bonus an amount equal to that proportion of the cost or value of the property on the basic date which the amount of the bonus bears to the sum of the bonus and the royalties expected to be received; and that such allowance shall be deducted from the amount remaining to be recovered by the lessor through depletion, and the remainder be recoverable through depletion deductions on the basis of royalties thereafter received. *Held,* a reasonable formula for allocating bonus to anticipated depletion where the estimates involved in its application are reasonable. P. 303.
5. Where the facts do not justify a finding that bonus plus expected royalties will exceed the invested capital, it is consistent with the amended rule *supra,* and not unreasonable, to allocate bonus paid in earlier years and not returned for taxation, entirely to depletion allowance, and thus reduce proportionately the amount of depletion allowance per barrel of royalty oil extracted in later years. P. 306.
6. In view of the state of the record in this case, the Circuit Court of Appeals did not abuse its discretion in not remanding the case to the Board of Tax Appeals because of the Commissioner's failure to find the "expected royalties." P. 308.

7. Repeated reënactments of a taxing provision under which Treasury Regulations had been adopted for its enforcement, *held* persuasive that the regulations conformed to the statute and were approved by Congress. P. 307.
8. *Burnet* v. *Thompson Oil & Gas. Co.*, 283 U. S. 301, distinguished. P. 307.
55 F. (2d) 17, affirmed.

CERTIORARI * to review the affirmance of a decision of the Board of Tax Appeals, 15 B. T. A. 1195, sustaining income tax assessments.

Messrs. Randolph E. Paul and *Thomas R. Dempsey,* with whom *Messrs. Ferris D. Stone* and *Bradner W. Lee* were on the brief, for petitioner.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Whitney North Seymour, Sewall Key,* and *J. Louis Monarch* were on the brief, for the respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on certiorari, 286 U. S. 541, to review a judgment of the Court of Appeals for the Ninth Circuit, 55 F. (2d) 17, which reversed an order of the Board of Tax Appeals, 15 B. T. A. 1195, and sustained a ruling of the Commissioner of Internal Revenue fixing the amount of depletion to be allowed and deducted from royalties received by petitioner in 1919 and 1920 as the lessor of oil lands, in determining petitioner's taxable income for those years.

In December, 1913, petitioner, the owner of two tracts of oil lands, leased them for stipulated net bonus payments, aggregating $5,173,595.18, and royalties of one-fourth of the oil produced by the lessee. All the bonus payments were made before 1919. Whether petitioner returned those payments as income or paid income tax on

* See Table of Cases Reported in this volume.

them for the years when received does not appear. During 1919 and 1920 petitioner received royalties from the leased lands. In returning its income for those years, it sought to deduct from the royalties received the entire original unit cost to it of the oil extracted during the taxable period, without any diminution by reason of the bonus payments which it had already received. Under the applicable Revenue Act of 1918, c. 18, 40 Stat. 1057, bonus and royalties received by the lessor of an oil lease, after deductions allowed by the taxing act, are taxable income of the lessor. See *Burnet* v. *Harmel, ante,* p. 103. The question to be decided is whether the Commissioner correctly calculated the deduction for depletion for the years in question, by treating the bonus previously received by the petitioner as a return of capital and by reducing *pro tanto* the depletion allowed on the royalties received in later taxable years

The court below sustained the Commissioner's treatment of the bonus payments as advanced royalties for which depletion must be allowed under § 234 (a) (9), Revenue Act of 1918, to the extent that they represent a return of capital, and held erroneous the conclusion of the Board of Tax Appeals that the entire bonus was taxable income. The correctness of this decision must first be determined, for if the Board was right in ruling that the bonus was not subject to a depletion allowance, the method of computing the depletion to be allowed on the royalties received during the taxable years in question would present no problem. The taxpayer would be entitled to deduct the full capital investment per barrel in the oil extracted during those years.

Section 234 (a) (9) of the 1918 Act includes in the authorized deductions from gross income:

"(9) In the case of mines, oil and gas wells, . . . a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in

each case, based upon cost including cost of development not otherwise deducted: . . . such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee; . . ."

We think it no longer open to doubt that when the execution of an oil and gas lease is followed by production of oil, the bonus and royalties paid to the lessor both involve at least some return of his capital investment in oil in the ground, for which a depletion allowance must be made under § 234. See *Burnet* v. *Harmel, supra.* This is obvious where royalties alone are insufficient to return the capital investment. A distinction between royalties and bonus, which would allow a depletion deduction on the former but tax the latter in full as income, when received, making no provision for a reasonably anticipated production of oil on the leased premises, would deny the "reasonable allowance for depletion" which the statute provides. The harsh operation of such a rule with respect to taxpayers generally is apparent and is emphasized by the opportunist character of petitioner's argument here. The rule for which it contends can operate to its advantage only if it fortuitously escapes payment of any tax on the bonus payments, which it insists shall be treated as income without the deduction of any depletion allowance.

Doubts, if any, whether the statute authorizes depletion of bonus payments, have been definitely set at rest by the repeated reënactment, without substantial change, of the provisions of § 234 (a) (9),[1] since the promulgation

[1] § 234 (a) (9), Revenue Act of 1921, 42 Stat. 227, 256; § 234 (a) (8), Revenue Act of 1924, 43 Stat. 253, 284; § 234 (a) (8), Revenue Act of 1926, 44 Stat. 9, 42; § 23 (l), Revenue Act of 1928, 45 Stat. 791, 800; § 23 (l), Revenue Act of 1932, 47 Stat. 173, 180.

of treasury regulations providing for such depletion.[2] See *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301, 307–8; *Brewster* v. *Gage*, 280 U. S. 327, 337; *National Lead Co.* v. *United States*, 252 U. S. 140, 146–147.

The question remains whether the method followed by the Commissioner in this case in allocating depletion to bonus and royalties failed to afford that "reasonable allowance" for depletion which the statute provides.

Article 215, Treasury Regulations 45 (1920 ed.) provided:

"(a) Where a lessor receives a bonus or other sum in addition to royalties, such bonus or other sum shall be regarded as a return of capital to the lessor, but only to the extent of the capital remaining to be recovered through depletion by the lessor at the date of the lease. If the bonus exceeds the capital remaining to be recovered, the excess and all the royalties thereafter received will be income and not depletable. If the bonus is less than the capital remaining to be recovered by the lessor through depletion, the difference may be recovered through depletion deductions based on the royalties thereafter received. The bonus or other sum paid by the lessee for a lease made on or after March 1, 1913, will be his value for depletion as of date of acquisition."

This paragraph of the regulation was amended, November 13, 1926, by Treasury Decision 3938, V–2, C. B. 117, to read as follows:

"(a) Where a lessor receives a bonus in addition to royalties, there shall be allowed as a depletion deduction

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[2]Art. 215 (a), Treasury Regulations 45 (1920 ed.), Revenue Act of 1918, continued intact in Art. 215(a), Treasury Regulations 62, Revenue Act of 1921; Art. 216(a), Treasury Regulations 65, Revenue Act of 1924. The amendment of subdivision (a), November 13, 1926, by T. D. 3938, V-2 C. B. 117, appears in Art. 216(a), Treasury Regulations 69, Revenue Act of 1926; Art. 236(a), Treasury Regulations 74, Revenue Act of 1928. See also the minimum royalty provision in Art. 236(b) of Regulations 74.

in respect of the bonus an amount equal to that proportion of the cost or value of the property on the basic date which the amount of the bonus bears to the sum of the bonus and the royalties expected to be received. Such allowance shall be deducted from the amount remaining to be recovered by the lessor through depletion, and the remainder is recoverable through depletion deductions on the basis of royalties thereafter received."

The important difference in operation between the regulation before its amendment and after, is in the case where the Commissioner properly finds that the sum of the bonus and expected royalties exceeds the lessor's capital investment in the oil in the ground. If, for example, the bonus were $1,000,000 and the estimated royalties were $2,000,000 and the capital investment of the lessor in the oil in the ground, to be depleted, were $2,000,000, the allowed depletion for return of the capital investment would be deducted, one-third from the bonus and two-thirds from the royalties as received.

The regulation thus operates to distribute the lessor's anticipated profit or the taxable net income to be derived from the extraction of all the oil ratably between the bonus and royalties, so that the estimated profit element in each will be taxed as received, subject to such readjustments of capital account as are authorized by paragraphs (c) and (d) of the amended regulation, in the event of termination, abandonment, or expiration of the lease before all the oil is extracted. But if the bonus and expected royalties together are not found to exceed the capital investment of the lessor, the entire bonus received in advance of royalties must be treated, after the amended regulation as well as before, as a return of capital, since, in that case, the expected royalties added to the bonus are, by hypothesis, sufficient to return no more than the lessor's capital.

Such was the case here. In determining petitioner's depletion allowance for the two years in question, the Commissioner made no specific determination of the "expected royalties" from the leased lands. But such a determination was of consequence in allocating depletion to the bonus only in the event that the total of bonus and expected royalties exceeded the invested capital of the taxpayer. No facts appear which would have justified such a finding and, without it, the requirements of the amended regulation were satisfied by treating the whole bonus as a return of capital, and deducting from the depletion allowance on each barrel of the royalty oil the proportion of the capital investment already returned by the bonus. This is what the Commissioner did:

He determined, on the basis of engineers' reports, the total amount of oil in the ground at the date of the lease and its value as of March 1, 1913. This he treated as petitioner's capital investment, to be returned by the depletion allowance. The computation necessarily revealed the per barrel capital investment in oil in the ground at the date of the lease. By making certain necessary capital investment adjustments, reflecting oil extraction during the years before 1919, the detail of which is not now important, he arrived at the per barrel capital investment of petitioner in oil in the ground in 1919 and 1920, the figure which would represent the actual amount of depletion of the capital investment for each barrel of oil extracted during those years, if there had been no bonus payments. His method of bringing the bonus into the computation amounted, in effect, to dividing the amount of the bonus by the total number of barrels of royalty oil in the ground, as indicated by the engineers' reports. The result represented the amount to be deducted from the depletion allowance per barrel of royalty oil which would otherwise have been made for those years. Stated

in another way, the total amount of the bonus was deducted from petitioner's total capital investment in oil in the ground returnable by depletion allowances, with a corresponding reduction in the per barrel capital investment in the oil reserve. Thus the Commissioner treated the whole of the bonus as a return, in advance of abstraction of the oil, of a part of the petitioner's capital investment in the oil in the ground, with which it would part, in a technical legal sense, only upon abstraction. In consequence, the deduction for depletion allowed on royalties received in 1919 and 1920 was reduced; it is of this reduction that petitioner complains.

We think the Commissioner's method "reasonable" within the meaning of the statute. The deduction for depletion from the bonus payments, which the statute requires, must either be made after the process of extracting the oil is complete, to the extent that the royalties received have been insufficient to replace invested capital, with the attendant inconvenience of indefinite postponement of the allocation of the bonus to income and return of capital, or a formula must be adopted by which the appropriate allocation may be made as the two classes of gross income, bonus and royalties, are received.

That formula the regulation purports to furnish. Where the estimates are reasonable, the formula affords a fair and convenient method of avoiding the present taxation of the bonus, when received, as income, in the face of the probability that it will ultimately prove not to be such. It will not fail to provide, with reasonable certainty, for the restoration of capital to which the taxpayer is entitled, if the oil extracted equals or exceeds the amount originally estimated. If less than that amount, it does not preclude revision and necessary adjustments, as errors appear probable. In addition, provision is made by subdivisions (c) and (d) of the regulation, as amended, for such necessary capital readjustments as may be occa-

sioned by the termination, abandonment or expiration of the lease before all the oil is extracted.

The method of computation provided by the amended regulation must be taken to have received the approval of Congress, for, as already noted, the provisions of article 215 (a), as amended, have been continued in the Treasury Regulations since 1926 and those of § 234 (a) (9) of the Revenue Act of 1918 have been reënacted without substantial change in the Revenue Acts of 1928 and 1932.

The problem here is different from that involved in *Burnet* v. *Thompson Oil & Gas Co., supra.* There it was held, interpreting § 234 (a) (9), that the part of the depletion not allowed by the 1913 statute in the year in which it occurred could not be carried over and added to the depletable base used in computing the tax for a later year under the 1918 Act, which allowed depletion in full. Here an anticipated depletion of capital is to be returned from bonus and future royalties, to the extent that the applicable statutes allow, and the problem is to allocate such anticipated depletion to a payment made in advance of its occurrence. This allocation is permitted by the statute.

Petitioner argues, nevertheless, that the regulation is unreasonable because it requires the Commissioner to estimate probable royalties which are dependent on the frequently unforeseeable future market value of oil. But the regulation does not require him to make estimates which are unreasonable, for where none can be made with reasonable accuracy the Commissioner cannot find that "the sum of the bonus and royalties expected to be received" exceeds the capital investment. In that event, the whole of the bonus will be treated, as in this case, as a return of capital. We cannot say that such a result is unreasonable on its face. The exigencies which "the peculiar conditions of each case" may present, we need not now consider. It is also unnecessary to inquire under

what circumstances the application of the regulation may fail to comply with the statute because the appraisals which are made are extravagant or impossible. In the case before us the accuracy of every estimate of the Commissioner is unchallenged. It cannot be said that the regulation, as applied here, was unauthorized by the statute because inadequate for its purpose or inconvenient or unjust in its operation.

Finally, petitioner urges that as the Commissioner failed to find the expected royalties to be received under the lease, the court below should have exercised its discretion to remand the case to the Board of Tax Appeals for a rehearing. § 1003 (b), Revenue Act of 1926, 44 Stat. 9, 110. As we have said above, the record does not disclose any facts from which the expected royalties might be determined. Neither the petitioner nor the Commissioner asked opportunity to supply such facts. It does not appear whether such an estimate could be made, or that, if made, the sum of the bonus and expected royalties would exceed the petitioner's capital investment, returnable by depletion. Hence, no case was made calling for the court below to exercise its discretion in petitioner's favor.

Affirmed.

BANKERS POCAHONTAS COAL CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 104. Argued November 18, 1932.—Decided December 5, 1932.

1. Royalties based on coal production, which were received by a lessor of coal land in 1920–1926 under leases executed before the date of the Sixteenth Amendment, *held* not converted capital taxable only by apportionment, but income taxable under the Revenue Act of 1918, whether title to the coal passed to the lessee upon the making of the leases, before the coal was severed, or only as the coal was mined. *Burnet* v. *Harmel, ante,* p. 103. P. 310.

2. Section 234 (a) (9) of the Revenue Act of 1918, and regulations thereunder, require depletion allowances upon bonus and royalty payments received by the lessor of mineral lands, sufficient to provide for a return in full of invested capital; and these provisions have been continued with the later Revenue Acts. *Murphy Oil Co.* v. *Burnet, ante,* p. 299. P. 311.
3. A point affecting tax liability, decided in a suit against a collector of taxes, is not *res judicata* against the Commissioner of Internal Revenue or the United States in litigation respecting later taxes. P. 311.
4. Rule 50 of the Board of Tax Appeals, which forbids the raising of new issues when the Board has determined a tax liability and the hearing is to compute the amount, is a proper exercise of the power of the Board to prescribe the practice in proceedings before it. P. 312.
5. The Board can not be held to have abused its discretion in denying a taxpayer a rehearing on a new issue when it does not appear that the evidence tendered was not available to the taxpayer in ample time to present it before the Board had made and filed its findings of fact and opinion. P. 313.

55 F. (2d) 626, affirmed.

CERTIORARI * to review the affirmance of a ruling, 18 B. T. A. 901, sustaining an increased assessment of income and profits taxes.

Mr. Camden R. McAtee, with whom *Mr. Wells Goodykoontz* was on the brief, for petitioner.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Andrew D. Sharpe* were on the brief, for the respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner, in 1912, acquired West Virginia coal lands in fee and, by assignment from the prior owners, certain leases or contracts entered into by them with various coal

* See Table of Cases Reported in this volume.

operators, by which the latter acquired the right to enter upon and use the lands for the production of coal and coke for a specified period, in consideration of stipulated royalties for the coal and coke produced, including minimum royalty payments in each year. In determining petitioner's income and profits taxes for the years 1920 to 1926, the Commissioner of Internal Revenue treated the royalty payments, after deducting a depletion allowance of 3.6¢ per ton of coal mined, as taxable income of petitioner, and assessed a corresponding increase in the tax. On appeal this ruling of the Commissioner was sustained, both by the Board of Tax Appeals, 18 B. T. A. 901, and the Court of Appeals for the Fourth Circuit, 55 F. (2d) 626. We granted certiorari on a petition which assails the judgment below on three grounds, which will be separately considered.

First. It is insisted that no part of the royalties is taxable income of petitioner. Petitioner rests this contention on what is stated to be a rule of law of West Virginia, that under coal leases, like those presently involved, the title to the coal, in place, passes to the lessee or operator immediately on execution of the lease. From this it is argued that the royalties received were but payments for capital assets acquired and sold before the adoption of the Sixteenth Amendment, and that their taxation as income is not authorized either by the statute or by the Sixteenth Amendment, because not apportioned.

The question whether payments of bonus and royalties from the lessee to the lessor of an oil lease are income within the meaning of the Revenue laws taxing income, or a return of capital as upon a sale of the oil, was recently before this Court in *Burnet* v. *Harmel, ante,* p. 103. Although it was contended there, as it is here, that by state law the title to the mineral content of the leased land passed to the lessee upon execution of the lease, it was

held that this characterization of the transaction in the local law did not affect the conclusion that the payments were gross income subject to tax, after the deductions allowed by the taxing act. The considerations which led to the conclusion that bonus and royalties paid to the lessor of Texas oil lands are taxable income and not a conversion of capital, as upon a sale of capital assets, are equally applicable to West Virginia coal leases, whether the title to the coal in place passes to the lessee at the date of the lease, or only upon severance by the lessee.

The applicable statutes thus construed and applied do not tax any part of petitioner's capital investment before March 1, 1913. Section 234 (a) (9) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, and regulations under it, require depletion allowances upon bonus and royalty payments received by the lessor of mineral lands, sufficient to provide for a return in full of his invested capital. The provisions of that section, and the related Treasury Regulations have been continued with the later Revenue Acts, see *Murphy Oil Co.* v. *Burnet,* decided this day, *ante,* p. 299. The fact that the depletion allowance under the Revenue Act of 1913 was more limited is not pertinent here. *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301.

Second. In a suit brought by the petitioner in the District Court for Northern West Virginia, *Bankers Pocahontas Coal Co.* v. *White, Collector of Internal Revenue,* with respect to taxes for the years 1914 to 1919, it was held that petitioner was entitled to a depletion allowance on royalties received from the leases involved in the present suit, of 5¢ per ton of coal mined. It is insisted that the decision in that case was *res adjudicata* of that issue, and that in fixing the depletion allowance of the present case at 3.6¢ per ton, the court below and the Board of Tax Appeals erroneously refused to follow the decision of the District Court in the earlier case. With respect to

this contention it is sufficient to say that the suit in the District Court was not against the Commissioner of Internal Revenue, the respondent here, but against the Collector, judgment against whom is not *res adjudicata* against the Commissioner or the United States. *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 430; *Sage* v. *United States,* 250 U. S. 33; see *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1; compare *Union Trust Co.* v. *Wardell,* 258 U. S. 537.

Third. After the Board of Tax Appeals had filed its findings of fact and opinion, both respondent and petitioner submitted recomputations of the amount of the deficiency under the Board's report, as provided by Rule 50 of the Board's Rules of Practice. In petitioner's recomputation, the claim was made for the first time that the minimum royalty payments stipulated by the leases had in some instances exceeded the amount of the per ton royalty which would have been payable on actual production, and it was asked that the depletion allowance be computed upon the basis of the actual payments made, instead of upon the number of tons extracted. Petitioner, at a hearing on the recomputation, tendered evidence in support of this claim. The Board rejected the evidence and denied petitioner's motion for a rehearing in order to present this contention. The court below upheld this action.

The Board is authorized to prescribe rules of practice and procedure for the conduct of proceedings before it. § 601, Revenue Act of 1928, c. 852, 45 Stat. 791, 871, 872, amending § 907 (a), Revenue Act of 1924, as amended; see *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117. Rule 50 prescribes the procedure for computing the amount of the deficiency after the Board has heard and decided the issues raised and presented on the merits. In terms, it directs that the hearing on the computation

which it authorizes is to be "confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the determination already made, and no argument will be heard upon or consideration given to . . . any new issues." The Board has held that under the Rule new issues may not be raised and urged on a hearing upon the computation. Great Northern Ry. Co. *v.* Commissioner, 10 B. T. A. 1347, affirmed on other issues 40 F. (2d) 372. The rule was a proper exercise of the power of the Board to prescribe the practice in proceedings before it. See *O'Meara* v. *Commissioner,* 34 F. (2d) 390, 395; *Boggs & Buhl* v. *Commissioner,* 34 F. (2d) 859, 861; *Metropolitan Business College* v. *Blair,* 24 F. (2d) 176, 178; compare *Sooy* v. *Commissioner,* 40 F. (2d) 634.

The purpose of the tendered evidence was to bring the case within the ruling of the Court of Appeals for the Ninth Circuit affirmed in *Murphy Oil Company* v. *Burnet, supra,* that bonus payments to the lessor of a mineral lease are to be treated as advanced payments of royalties and depletion allowed. This was a new issue. We need not consider the contention of the government that it does not clearly appear either that the stipulated minimum payments exceeded the total per ton royalties upon the leases or that, even if they did, the excess of the minimum royalties over the royalties computed on actual production can, upon a proper construction of the leases, be treated as advance payment of the per ton royalties to accrue in future years. It is not shown that the evidence tendered was not available to the petitioner in ample time to present it before the Board had made and filed its findings of fact and opinion. Under the circumstances, we cannot say that the Board abused its discretion in denying a rehearing.

Affirmed.

STROTHER *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 105. Argued November 18, 1932.—Decided December 5, 1932.

Decided in accordance with *Bankers Pocahontas Coal Co.* v. *Burnet*, *ante*, p. 308, pursuant to a stipulation of the parties.
55 F. (2d) 626, affirmed.

CERTIORARI * to review a judgment sustaining a decision of the Board of Tax Appeals, 18 B. T. A. 901, which upheld a ruling of the Commissioner of Internal Revenue.

Mr. Camden R. McAtee, with whom *Mr. Wells Goodykoontz* was on the brief, for petitioner.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher*, and *Messrs. Whitney North Seymour, Sewall Key*, and *Andrew D. Sharpe* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The decision in this case, which is here on certiorari, turns on that in *Bankers Pocahontas Coal Co.* v. *Burnet*, just decided, *ante*, p. 308.

Petitioner, a stockholder in the Bankers Pocahontas Coal Co., received dividends upon his stock which were, to some extent, a distribution of the royalty payments received by the corporation and involved in its suit against the Commissioner. The ruling of the Commissioner in this case, that the amounts so distributed from royalties were taxable income, was upheld by the Board of Tax Appeals, 18 B. T. A. 901, and by the Court of

* See Table of Cases Reported in this volume.

Appeals for the Fourth Circuit, 55 F. (2d) 626, which remanded the case to the Board for further proceedings, to enable the petitioner to offer additional testimony having a bearing on the correct computation of the deficiency, in accordance with the opinion of the court. The parties stipulate that the decision of this case shall be controlled by that of *Bankers Pocahontas Coal Co.* v. *Burnet*, and the judgment below is accordingly

Affirmed.

REICHELDERFER ET AL. *v.* QUINN ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 9. Argued October 17, 1932.—Decided December 5, 1932.

1. Under the Act of Congress authorizing the establishment of Rock Creek Park in the District of Columbia, the lands taken for the park by purchase and condemnation were "perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States." By Act of a later Congress, the Commissioners of the District were directed to erect a fire engine house at a designated location in the park. Owners of neighboring land, claiming a right, in the nature of an easement, to have the land used for park purposes and no other, sought to enjoin the construction. *Held:*

   (1) The neighboring landowners derived no rights against the Government from the dedication of the park alone, since this constituted only a declaration of public policy by the particular Congress, which was not binding on its successors. P. 318.

   (2) Assuming that the building of the engine house was a diversion of the land from park uses, the change of use was within the legislative power. P. 320.

2. The existence of value alone does not generate interests protected by the Constitution against diminution by the Government, especially where the value was both created and diminished as an incident of the operation of government. P. 319.

3. The Rock Creek Park Act directed that surrounding lands be assessed to the extent that they were "specially benefited by reason

of the location and improvement" of the park. *Held,* that inasmuch as the dedication of the park did not imply a promise to neighboring landowners that it would be continued in perpetuity, this was not one of the special benefits required to be assessed, and the landowners therefore derived no right to perpetual maintenance of the park by virtue of the assessment; the benefits intended to be assessed must be taken to be those obvious advantages which would accrue to lands in the vicinity of the park, because of their location, and which would be reflected in their market value, even though there were no guaranty that the park would be continued for any particular length of time. P. 321.

4. Statutes restricting the power of government by the creation of private rights are to be strictly construed for the protection of the public interest. P. 321.
5. Zoning regulations for the District of Columbia are not contracts by the Government and may be modified by Congress. P. 323.

60 App. D. C. 325; 53 F. (2d) 1079, reversed.

CERTIORARI, 285 U. S. 535, to review a decree affirming a decree enjoining the Commissioners of the District of Columbia from constructing a fire engine house in Rock Creek Park.

Mr. Robert E. Lynch, with whom *Messrs. William W. Bride* and *Vernon E. West* were on the brief, for petitioners.

Mr. George E. Sullivan, with whom *Messrs. Joseph A. Burkart* and *Henry I. Quinn* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on certiorari, 285 U. S. 535, to review a decree of the Court of Appeals of the District of Columbia, 53 F. (2d) 1079. Following its earlier decision in *Quinn* v. *Dougherty,* 30 F. (2d) 749, that court affirmed a decree of the Supreme Court of the District, enjoining the petitioners, the District Commissioners, from erecting a fire engine house in Rock Creek Park at a point near

the property of some of the respondents, and adjoining that of others.

The Commissioners are directed by Act of Congress, 45 Stat. 667, to build the engine house at the designated location within the park. The presence of such a structure will, it is admitted, diminish the attractiveness of respondents' lands for residence purposes and, in consequence, decrease their exchange value. Respondents contend that they have a valuable right appurtenant to their land, in the nature of an easement, to have the land used for park purposes, and that the Act of Congress, directing its use for other purposes, is a taking of their property without just compensation in violation of the Fifth Amendment.

For present purposes we assume that the proposed building will divert the land from park uses, and address ourselves to the question upon which the other issues in the case depend, whether the respondents, plaintiffs in the trial court, are vested with the right for which they invoke constitutional protection.

There is no contention that such a right arises as an incident to the ownership of neighboring land, as does an easement of light and air, under the law of some states. See *Muhlker* v. *Harlem R. Co.*, 197 U. S. 544, 564; compare *Marchant* v. *Pennsylvania R. Co.*, 153 U. S. 380. But it is argued that the right asserted, whether it be regarded as arising from a contract with the government or an interest in its lands, has a definite source in the transaction by which the park was created.

The court below found this source in the first paragraph of the Rock Creek Park Act, 26 Stat. 492, by which the lands taken for the park by purchase or condemnation were "perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States . . .," and in the as-

sessment under § 6,[1] of surrounding lands, including those of respondents, to the extent that they were "specially benefited by reason of the location and improvement" of the park. The question is thus one of construction of the statute; if it did not create the private rights asserted, it is unnecessary to invoke the police power, as petitioners do, to justify the construction of the engine house. Cf. *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31.

First. The respondents derived no rights against the government from the dedication of the park alone. The park lands purchased or condemned by authority of the Rock Creek Park Act were vested in the United States in fee. Section 3 of the Act twice declares that "the title" and once that "the fee" of the condemned lands shall vest in the United States. By dedicating the lands thus acquired to a particular public use, Congress declared a public policy, but did not purport to deprive itself of the power to change that policy by devoting the lands to other uses. The dedication expressed no more than the will of a particular Congress which does not impose itself upon those to follow in succeeding years. See *Newton* v. *Commissioners*, 100 U. S. 548, 559; *Connecticut Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602, 621.

It is true that the mere presence of the park may have conferred a special benefit on neighboring owners and

[1] "Sec. 6. That the commission having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expenses upon the lands, lots, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate.

"If said commission shall find that the real estate in said District directly benefited by reason of the location of the park is not benefited to the full extent of the estimated cost and expenses, then they shall assess each tract or parcel of land specially benefited to the extent of such benefits as they shall deem the said real estate specially benefited. . . ."

enhanced the value of their property. But the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its action may be. The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by public authority, *Meyer* v. *Richmond,* 172 U. S. 82, 95; cf. *Whitney* v. *New York,* 96 N. Y. 240; *Fox* v. *Cincinnati,* 104 U. S. 783; *Kirk* v. *Maumee Valley Co.,* 279 U. S. 797, 802, 803; *Smith* v. *Boston,* 7 Cush. 254; *Stanwood* v. *Malden,* 157 Mass. 17; 31 N. E. 702, or a street grade is raised, *Smith* v. *Washington,* 20 How. 135; see *Mead* v. *Portland,* 200 U. S. 148, 162, or the location of a county seat, *Newton* v. *Commissioners, supra,* or of a railroad is changed. *Bryan* v. *Louisville & N. R. Co.,* 244 Fed. 650, 659. But in such cases no private right is infringed.[2]

Beyond the traditional boundaries of the common law only some imperative justification in policy will lead the courts to recognize in old values new property rights. Compare *International News Service* v. *Associated Press,* 248 U. S. 215, with *Cheney Bros.* v. *Doris Silk Corp.,* 35 F. (2d) 279. The case is clear where the question is not of private rights alone, but the value was both created and diminished as an incident of the operations of the government. For if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated, the powers of government would be exhausted by their exercise.

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[2] Compare the decisions holding that access to a water line may be destroyed in the interest of navigation, *Gibson* v. *United States,* 166 U. S. 269; *Scranton* v. *Wheeler,* 179 U. S. 141; cf. *Greenleaf Johnson Lumber Co.* v. *Garrison,* 237 U. S. 251, or a tract of land, unrelated to that taken, incidentally damaged, *Sharp* v. *United States,* 191 U. S. 341; cf. *Richards* v. *Washington Terminal Co.,* 233 U. S. 546, 553, 554, without payment of compensation.

The case of a park is not unique as the court below seems to have thought.[3] See *Quinn* v. *Dougherty*, 30 F. (2d) 749, 751. It has often been decided that when lands are acquired by a governmental body in fee and dedicated by statute to park purposes, it is within the legislative power to change the use, *Clark* v. *Providence*, 16 R. I. 337; 15 Atl. 763; *Mowry* v. *Providence*, 16 R. I. 422; 16 Atl. 511; *Seattle Land & Improvement Co.* v. *Seattle*, 37 Wash. 274; 79 Pac. 780; *Reichling* v. *Covington Lumber Co.*, 57 Wash. 225; 106 Pac. 777; see *Higginson* v. *Boston*, 212 Mass. 583; 99 N. E. 523, or to make other disposition of the land. *Wright* v. *Walcott*, 238 Mass. 432; 131 N. E. 29; see *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 234, 245; compare *East Chicago Co.* v. *East Chicago*, 171 Ind. 654; 87 N. E. 17; *Whitney* v. *New York*, *supra*; *Eldridge* v. *Binghamton*, 120 N. Y. 309; 24 N. E. 462. The abutting owner cannot complain; the damage suffered by him "though greater in degree than that of the rest of the public, is the same in kind." See *United States* v. *Welch*, 217 U. S. 333, 339.

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[3] A different question is presented in the cases relied on by the court below which indicate that a dedication of land to the public, by an individual, or a conveyance to a municipality, to be used as a park, is subject to a condition or imposes a trust that the use be continued, breach of which may be restrained. *Douglass* v. *Montgomery*, 118 Ala. 599; 24 So. 745; cf. *Cincinnati* v. *White*, 6 Pet. 431; *Sheffield & Tuscumbia Street Ry. Co.* v. *Rand*, 83 Ala. 294; 3 So. 686; see also, *Riverside* v. *MacLain*, 210 Ill. 308; 71 N. E. 408; *Price* v. *Thompson*, 48 Mo. 361; 3 Dillon, Municipal Corporations (5th ed.), § 1102. There, rights in the land or against the municipality were said to have been reserved in the grantor or created in the owners of neighboring land by the terms of the grant.

Equally distinguishable are the decisions which likewise deal with the authority of a municipality, not the power of the legislature, to divert park lands from park uses, but in which the lands were acquired by unrestricted purchase or by eminent domain. See 3 Dillon, *supra*, §§ 991, 1023,

Second. The fact that lands, including those now owned by respondents, were assessed for benefits, as directed by the Rock Creek Park Act, leads to no different conclusion. Respondents urge that the special benefits required to be assessed included those accruing from the perpetual maintenance of the park; that by virtue of the assessment they have paid for the right to enjoy those benefits in perpetuity. We may assume that the landowners acquired rights commensurate with the assessments authorized. But the statute does not purport to place restrictions on the park lands in their favor, and the decision of this Court sustaining the constitutionality of the assessment provision (*Wilson* v. *Lambert,* 168 U. S. 611), gives no hint that among the benefits for which they were required to pay was a right against the government to have the lands forever used as a park.

All that the statute says is that the lands acquired shall be perpetually dedicated as a park for the enjoyment of the people of the United States (§ 1) and that benefits shall be assessed (§ 6). Statutes said to restrict the power of government by the creation of private rights are, like other public grants, to be strictly construed for the protection of the public interest. *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 544–548; *Christ Church* v. *County of Philadelphia,* 24 How. 300; *Knoxville Water Co.* v. *Knoxville,* 200 U. S. 22, 33; *Larson* v. *South Dakota,* 278 U. S. 429. Thus construed, the dedication of the park, a declaration of a present purpose, does not imply a promise to neighboring land-owners that the park would be continued in perpetuity. Cf. *Newton* v. *Commissioners, supra.* The benefit of a governmental obligation which the statute neither expresses nor implies obviously was not to be assessed.

We think that the benefits intended must be taken to be those obvious advantages which would accrue to lands in the vicinity of a park, because of their location, and

which would be reflected in their market value, even though there were no guaranty that the park would be continued for any particular length of time.[4] See *Wilson* v. *Lambert, supra,* 617; cf. *Susquehanna Power Co.* v. *State Tax Commn.,* 283 U. S. 291, 296; *Burbank* v. *Fay,* 65 N. Y. 57, 64. So it was held in *Thayer* v. *Boston,* 206 Fed. 969, where contentions very similar to those made here were rejected. See also *Brooklyn Park Commissioners* v. *Armstrong, supra,* 245. The same result has been reached with regard to the assessment of benefits arising from other types of public improvements, *Whitney* v. *New York, supra,* 246; *Chicago* v. *Union Building Assn.,* 102 Ill. 379, 397; *Kean* v. *Elizabeth,* 54 N. J. L. 462; 24 Atl. 495, affirmed 55 N. J. L. 337; 26 Atl. 939; see *Home for Aged Women* v. *Commonwealth,* 202 Mass. 422, 429, 430; 89 N. E. 124; 1 Nichols, Eminent Domain (2d ed.), § 116; and is implicit in the statement, frequently made, that such assessments are an exercise of the taxing power. See *Bauman* v. *Ross,* 167 U. S. 548, 588; *Wilson* v. *Lambert, supra,* 614; *Memphis & Charleston Ry.* v. *Pace,* 282 U. S. 241, 245.

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[4]As originally introduced and reported, the bill authorizing and establishing the park (S. No. 4, 51st Cong., 1st Sess.) had no provision for the assessment of benefited property. 21 Cong. Rec. 96, 353, 902, 1109, 2371, 2578–90. Such a method of financing was suggested by Representative Payson, *ibid.* 2580, who offered an amendment embodying this plan, *ibid.* 3939, which, after conference, was adopted, in substance, as § 6. See *ibid.* 3952–3, 5300–3, 5673, 5902–3, 5988, 6163, 10417–9, 10457–8, 10441–4. In explaining the assessment provision on the floor, Mr. Payson said: "Suppose that a man owns a piece of property, distant, we will suppose, a quarter of a mile from the park and that piece of property is worth today $1,000. Now, if by reason of the expenditure made by the Government in this great public improvement this man's property should become, in the judgment of the commission, worth $2,000, the direct benefit thus arising to the property would be assessed against it to assist in paying for the proposed improvement." *Ibid.* 3940.

The possibility that the United States might, at some later date, rightfully exercise its power to change the use of the park lands, so far as it affected present value, was a proper subject for consideration in valuing the benefits conferred. Cf. *United States* v. *River Rouge Co.*, 269 U. S. 411; *Sears* v. *Street Commissioners*, 180 Mass. 274, 282; 62 N. E. 397; *Whitney* v. *New York, supra;* 1 Nichols, Eminent Domain, *supra.*

Property was not taken without just compensation by either the Rock Creek Park Act or the statute authorizing the construction of the fire house. The only taking occurred when the lands were condemned for the park. Just compensation, the value at that time, *Vogelstein & Co.* v. *United States*, 262 U. S. 337; *United States* v. *New River Collieries Co.*, 262 U. S. 341, 344, was awarded if the benefits resulting from the proximity of the improvement, valued as the Act prescribed, were, as respondents assert, set off against the value of the property taken from the same owners. *Bauman* v. *Ross, supra; Whitney* v. *New York, supra; Eldridge* v. *Binghamton, supra;* see *Matter of City of New York*, 190 N. Y. 350, 357, 360; 83 N. E. 299.

We note, but do not discuss at length, the objection that the statute authorizing the construction of the fire house is invalid because inconsistent with regulations under the Zoning Act for the District (41 Stat. 500), setting apart the area in the vicinity of the park for residential properties of the highest class. It is enough to say that the zoning regulations are not contracts by the government and may be modified by Congress. The record and briefs disclose no facts which require us to consider how far the exercise of the power to modify may be subject to constitutional limitations.

Reversed.

ELTING, COLLECTOR OF CUSTOMS, *v.* NORTH GERMAN LLOYD.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 42. Argued November 10, 11, 1932.—Decided December 5, 1932.

1. Section 6 of the Quota Act, as amended, imposing penalties for bringing to the United States any alien not admissible under the terms of the Act, applies to all aliens who are not within the quota or one of the excepted classes, whether seeking admission as immigrants or not. P. 327.
2. A penalty under the section may legally be imposed upon a transportation company for bringing to the United States an alien who upon arrival is found to be inadmissible, although the statute imposes no penalty, other than possible exclusion, upon the alien for coming here to present evidence in support of his right to enter. P. 327.
3. The Secretary did not abuse his discretion in refusing to remit a fine for bringing an inadmissible alien to the United States, where he gave the carrier a hearing and acted on substantial evidence tending to show that, by the exercise of reasonable diligence in making inquiry of the alien before sailing, it could have ascertained that the alien was not entitled to admission as a member of an excepted class. P. 328.
4. The transportation company was bound to know the law that a consular visa on the alien's passport, noting that he was going to the United States "on business," did not of itself entitle the alien to entry as a member of that excepted class. P. 329.

54 F. (2d) 997, reversed.

CERTIORARI, 286 U. S. 538, to review a judgment affirming a judgment against the Collector in a suit brought by the steamship company to recover a fine imposed on it under the Quota Act.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Paul D. Miller, W. S. Ward,* and *Bradley B. Gilman* were on the brief, for petitioner.

Mr. Melville J. France for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent, an operator of steamships, brought suit in the District Court for Southern New York, to recover a fine imposed on it by the Secretary of Labor, under § 6 of the Quota Act of 1921, c. 8, 42 Stat. 5, as amended May 11, 1922, c. 187, 42 Stat. 540, for bringing into the United States an alien, inadmissible under that Act. Upon pleadings and affidavits, the District Court gave summary judgment for the respondent which was affirmed by the Court of Appeals for the Second Circuit, 54 F. (2d) 997. The case is here on certiorari.

The Quota Act of 1921 imposed restrictions on the number of immigrants of any nationality who might annually be admitted to the United States, but provided by § 2 (a) (4) that the restriction should not apply to "aliens visiting the United States as tourists or temporarily for business or pleasure." The 1922 amendment of the Act added § 6,[1] which provides:

"That it shall be unlawful for any person . . . to bring to the United States . . . any alien not admissible under the terms of this Act or regulations made thereunder, and if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought, such person . . . shall pay to the collector of customs . . . the sum of $200 for each alien so brought, and in addition a sum equal to that paid by such alien for his transportation . . . such latter sum to be delivered . . . to the alien . . ."

The section also provides:

"Such fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such person . . . prior to the departure of the vessel . . ."

[1] § 6 of the Quota Act was superseded by § 16 of the Immigration Act of 1924, c. 190, 43 Stat. 153, 163, 8 U. S. C., § 216.

The record in the present case raises no question of the correctness or sufficiency of the procedure before the Secretary of Labor. The only issue is the legality upon the unchallenged facts of the imposition of the fine and the refusal of the Secretary to remit it.

On February 14, 1924, respondent brought a German alien to the United States on its steamship "Bremen." On embarkation the alien had represented to the respondent that he was going to the United States on a temporary visit for the purpose of collecting an inheritance, and was in possession of a United States consular visa, bearing the notation: "Purpose to proceed to the United States on business only within the meaning of § 2 of the Restrictive Immigration Law." Upon arrival in the United States the alien was detained by immigration officials and upon a hearing before a Board of Special Inquiry his claim that he was visiting the United States temporarily for business was rejected. He was ordered deported, on the ground that he was a quota immigrant and the quota applicable to his nationality was then exhausted. At the hearing before the Board it appeared that he arrived without money or a return ticket. His passage had been paid by a relative in the United States. He claimed to be coming to the United States to collect an inheritance of $400, but was without documentary evidence to support this claim, and it had cost him nearly one-half of the amount of the legacy to come here.

The Secretary notified the respondent that the ascertained facts indicated its liability to a fine (including the repayment of passage money) for bringing the alien to the United States, but permitted the vessel to clear upon respondent's depositing with the collector under protest the amounts to be paid. The imposition of the fine was protested on the ground that respondent had accepted the alien for transportation in good faith, in reliance upon the consular visa and the notation upon it. It does not

appear that the respondent made any inquiry as to the truth of the alien's claim to be a temporary visitor to the United States for the purpose of collecting an inheritance. After a hearing, the Secretary required payment of the fine and passage money and refused to remit the penalties.

The court below held that the fine was illegally imposed, for if the alien was in fact within the excepted class, he was admissible; hence it was lawful for him to come to the United States to present evidence in support of his right to enter, and it was lawful for the respondent to bring him. The respondent argues here, in addition, that the general purpose of the Quota Act was to exclude immigrants, and the provisions of § 6 imposing penalties for bringing an "alien," must be read as applicable only to aliens who seek admission as immigrants.

The statute itself answers the contention that the Act does not apply because the alien did not embark as an immigrant. Section 6 refers to "any alien not admissible under the terms of this Act" and § 2 (d) provides that when the aliens of any nationality admitted in any fiscal year shall exceed the quota "all other aliens of such nationality, except as otherwise provided in this Act, who may apply for admission during the same fiscal year, shall be excluded." Thus all aliens, whether they seek admission as immigrants or not, if they are not within the quota or one of the excepted classes, are "not admissible under the terms of" the Quota Act.

We do not think it can be said, in the face of the explicit language of the statute, that the respondent could lawfully bring the alien, because he lawfully might come to the United States. The statute imposes no penalty upon the alien for coming beyond the possible denial of his application to enter. But it does declare that it shall be unlawful for the steamship company to bring him if "not admissible," as was the case, and imposes the penalty if

the Secretary finds, as he did, that an inadmissible alien has been brought. In plain terms the Act placed on respondent the burden of acting at its peril that the fine might be imposed in the case of this alien, as with any other, if the event should prove that he was inadmissible. Whether the same result would follow if, as in *Compagnie Francaise de Navigation a Vapeur* v. *Elting,* 19 F. (2d) 773; see *North German Lloyd* v. *Elting,* 48 F. (2d) 547, 549, the line transported an alien entitled under the Immigration Rules to present evidence that he had not abandoned a domicil previously acquired in the United States, we need not now determine.

The burden which the statute imposes on the transportation companies is lightened, though not removed,[2] by the provision authorizing the Secretary to remit the fine if it appears to his satisfaction that the inadmissibility of the alien could not have been ascertained by the steamship company "by the exercise of reasonable diligence" before sailing. We assume that it was the duty of the Secretary to remit the fine if the evidence established that the alien's inadmissibility could not have been ascertained by respondent by the exercise of reasonable diligence before the vessel sailed. But we cannot say that the discretion which, under the statute he alone may exercise, was abused. Respondent was bound to know the law that

[2] Section 6 of the Quota Act of 1921 was added by amendment of May 11, 1922, c. 187, 42 Stat. 540. The amendment as originally introduced imposed a fine upon the steamship company for bringing to the United States an alien who was inadmissible under the statute and ended with the words "and such fine shall not be remitted or refunded." In conference the words quoted were deleted and what is now the third sentence of § 6, providing for remission of the fine by the Secretary, was substituted. H. R. No. 945, 67th Cong., 2d Sess. Before this change the effect of the section was to impose the fine without qualification if the steamship company brought to the United States an inadmissible alien. The addition of provisions for remission of the fine, once imposed, did not alter its meaning.

the consular visa on the alien's passport did not entitle him to entry as a member of the excepted class. Cf. *United States ex rel. Spinosa* v. *Curran,* 4 F. (2d) 613, affirmed, 4 F. (2d) 614. The Secretary gave respondent a hearing and acted on substantial evidence, already detailed, tending to show that by the exercise of reasonable diligence in making inquiry of the alien before sailing, the respondent could have ascertained that he was not entitled to admission as a member of the excepted class.

Reversed.

LLOYD SABAUDO SOCIETA ANONIMA PER AZIONI *v.* ELTING, COLLECTOR OF CUSTOMS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 48. Argued November 11, 1932.—Decided December 5, 1932.

1. On certiorari only so much of the judgment below as was adverse to the petitioner is reviewable. P. 331.
2. Section 9 of the Immigration Act of 1917, as amended, which confers upon the Secretary of Labor, as an administrative officer, authority to impose money penalties upon persons or transportation companies bringing to the United States aliens afflicted with any of the diseases therein enumerated, or with any mental or physical defect which may affect his ability to earn a living, when it appears to the satisfaction of the Secretary that such disease or defect was existent and discoverable by competent medical examination at the time of embarkation, was a valid exercise of the power of Congress. P. 334.
3. The statute is an incident to the exercise by Congress of its plenary power to control the admission of aliens, and inasmuch as the fines prescribed are not unreasonable or confiscatory in amount, their imposition by administrative action, rather than by judicial procedure, does not deny due process. P. 335.
4. In determining liability under the section, the Secretary's conclusion as to the weight of the evidence is final, and his determination will not be set aside where challenged solely upon this ground. P. 338.

5. Where, in determining liability, the Secretary fails to consider evidence before him, he exceeds his authority; where he relies alone upon the medical opinion of examining physicians at the port of entry, without submitting to them facts which might properly have influenced their opinion, he acts arbitrarily and unfairly; and, in either case, his determination must be set aside. P. 339.
6. The statute is violated when an alien not admissible under its terms is brought to the United States; and a penalty may thereupon be imposed, notwithstanding that the admissibility of the alien could not be determined in advance of his arrival, or that he was not seeking to remain here permanently. *Elting* v. *North German Lloyd, ante,* p. 324. P. 340.
7. To secure remission of the fine imposed under § 16 of the Immigration Act of 1924, a transportation company which brought to the United States a quota immigrant having a nonquota visa, in violation of that section, has the burden of establishing to the satisfaction of the Secretary that it could not have been ascertained by the exercise of reasonable diligence that the alien was a quota immigrant. P. 341.

55 F. (2d) 1048, reversed in part.

CERTIORARI, 286 U. S. 539, to review a judgment which affirmed in part and reversed in part a judgment in an action brought by the steamship company against the Collector of Customs to recover fines imposed under the Immigration Act. Opinion of District Court, 45 F. (2d) 405; see also, 46 F. (2d) 315.

Mr. Delbert M. Tibbetts, with whom *Messrs. Gaspare M. Cusumano* and *Richard L. Sullivan* were on the brief, for petitioner.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Mr. Paul D. Miller* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner, a steamship transportation company, brought suit in the District Court for Southern New York, to recover from the Collector of Customs certain fines

alleged to have been illegally exacted by the Secretary of Labor under § 9 of the Immigration Act of 1917, c. 29, 39 Stat. 874, 880, or its amendment by § 26 of the Immigration Act of 1924, c. 190, 43 Stat. 153, 166, 8 U. S. C., § 145. The complaint stated fifteen causes of action, one for each fine involved. The trial court directed a verdict for the petitioner on three causes of action, the 9th, 11th and 15th, and for the respondent on all the others, and gave judgment accordingly. 45 F. (2d) 405, see also 46 F. (2d) 315. Upon appeal by both parties the judgment of the District Court was affirmed by the Court of Appeals for the Second Circuit, 55 F. (2d) 1048, except as to the 15th cause of action, with respect to which it was reversed. As certiorari was granted, 286 U. S. 539, on petition of the steamship company alone, only so much of the judgment below as decided in favor of the Collector is brought before us for review. *Federal Trade Commission* v. *Pacific Paper Assn.*, 273 U. S. 52, 66; *The Malcolm Baxter, Jr.*, 277 U. S. 323.

Section 9 of the Immigration Act, as amended, provides that:

" it shall be unlawful for any person, including any transportation company, . . . to bring to the United States . . . from a foreign country . . . any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional psychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company . . . shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of

$1,000, and in addition a sum equal to that paid by such alien for his transportation . . . , for each and every violation of the provisions of this section, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. . . ."

The same section also makes it unlawful

" to bring to any port of the United States any alien afflicted with any mental defect other than those above specifically named, or physical defect of a nature which may affect his ability to earn a living, as contemplated in § 3 of this Act, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was so afflicted at the time of foreign embarkation, and that the existence of such mental or physical defect might have been detected by means of a competent medical examination at such time, such person shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $250, and, in addition a sum equal to that paid by such alien for his transportation. . . ."

Between the years 1923 and 1927 the petitioner brought to the United States in its vessels the thirteen aliens with respect to whose transportation the fines now in question were imposed. All were found, upon arrival, to be inadmissible because they were afflicted either with one of the diseases specified in § 9, or with a physical defect which might affect the alien's ability to earn a living. In each case in the proceedings before the Board of Special Inquiry to pass on the admissibility of the alien, the examining physicians of the Health Department certified to his diseased condition or disability on arrival, adding: " In our opinion the condition herein certified might have been detected by competent medical examination at the port of embarkation." In each instance the petitioner was notified of the certificate of the medical examiners, advised that such findings indicated its liability to fine

under § 9 of the Act of 1917 or its amendment of 1924, and given thirty or sixty days in which to have a hearing. In each case the petitioner responded to the notice by depositing the amount of the possible fine, in order to secure clearance of the vessel,[1] and transmitting an unverified letter of protest against the imposition of the fine, stating generally that it was the regular practice of the petitioner to have each immigrant carefully examined by competent doctors before embarkation and that, therefore, the disease or disability either did not exist at the time of embarkation or could not then have been discovered by means of competent medical examination, or was of such a nature as could not affect the alien's ability to earn a living. In one case, that of Fusco, stated in the tenth cause of action, the letter of protest was accompanied by affidavits, tending to confirm the statements contained in the protests. In all thirteen cases fines were imposed by the Secretary and the funds deposited by petitioner were retained by the Government.

The " files " or " records " upon which the Secretary of Labor based his decisions that the fines should be imposed, consisted in general of the transcript of the hearing and examination before the Board of Special Inquiry at Ellis Island, in which the admissibility of the alien was passed upon, which included a reference to the medical certificate, the petitioner's letter of protest and any accompanying documents, and various communications of an inter-departmental character relating to the disposition of the alien by the Secretary.

At the trial in the District Court, the petitioner introduced evidence which had not been presented to the Department of Labor tending to show that a competent med-

[1] The statute provides that no vessel shall be granted clearance pending a determination of the question whether the fine should be imposed, except upon deposit of the amount of the possible fine or of a bond to secure its payment.

ical examination had been made of the aliens at the port of embarkation and that the diseases or disabilities, on the basis of which the fines had been imposed, had not in fact been discovered and were not discoverable at that time by such an examination. Although the trial judge thought that this evidence tended to show in detail the thoroughness of the examinations and the competence of the physicians, he struck out this class of testimony and held, on the basis of the record made before the Secretary, that there was evidence supporting his action.

The petitioner contends here, as it did before the courts below, that the evidence offered at the trial was erroneously excluded; that if § 9 is construed to preclude a judicial trial of the issues before the Secretary, it denies to petitioner due process of law and, finally, that in any case the fines were not validly imposed because the Secretary of Labor abused the discretion reposed in him by the statute.

The first two objections are untenable. By the words of the statute the Secretary's is the only voice authorized to express the will of the United States with respect to the imposition of the fines; the judgment of a court may not be substituted for the discretion which, under the statute, he alone may exercise. In conferring that authority upon an administrative officer, Congress did not transcend constitutional limitations. Under the Constitution and laws of the United States, control of the admission of aliens is committed exclusively to Congress and, in the exercise of that control it may lawfully impose appropriate obligations, sanction their enforcement by reasonable money penalties, and invest in administrative officials the power to impose and enforce them. *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320; *Passavant* v. *United States*, 148 U. S. 214; see *Hampton & Co.* v. *United States*, 276 U. S. 394, 406; *Navigazione Libera Triestina* v. *United States*, 36 F. (2d) 631; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275.

In *Oceanic Navigation Co.* v. *Stranahan, supra,* this Court upheld the constitutionality of § 9 of the Immigration Act of 1903, c. 1012, 32 Stat. 1213, 1215, which is substantially the same as the present section, except that it imposed smaller penalties. Petitioner contends that as the fines have been increased tenfold, the issue of liability has become so grave that the *Stranahan* case is no longer controlling and the imposition of the fines by administrative action is a denial of due process unless opportunity is afforded at some stage to test their validity in court by a trial of the facts *de novo.*

As was pointed out in the *Stranahan* case, the statute imposing the fines must be regarded as an incident to the exercise by Congress of its plenary power to control the admission of aliens, and due process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of such a fine depends. It follows that as the fines are not invalid, however imposed, because unreasonable or confiscatory in amount, which is conceded, Congress may choose the administrative rather than the judicial method of imposing them. Indeed, the Court rested its decision in *Oceanic Navigation Co.* v. *Stranahan, supra,* on the authority of cases arising under the revenue laws, authorizing the administrative imposition of civil penalties frequently much greater than those imposed here. *Bartlett* v. *Kane,* 16 How. 263, 274; *Passavant* v. *United States, supra; Origet* v. *Hedden,* 155 U. S. 228; see *Murray's Lessee* v. *Hoboken Land & Imp. Co.,* 18 How. 272.

The action of the Secretary is, nevertheless, subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority, compare *Gonzales* v. *Williams,* 192 U. S. 1; *Gegiow* v. *Uhl,* 239 U. S. 3, whether there was any evidence before him to support his determination,

compare *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, and whether the procedure which he adopted in making it satisfies elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized. Compare *Kwock Jan Fat* v. *White,* 253 U. S. 454; *Tang Tun* v. *Edsell,* 223 U. S. 673; *Chin Yow* v. *United States,* 208 U. S. 8, 12; *The Japanese Immigrant Case,* 189 U. S. 86, 100, 101; see *United States ex rel. Iorio* v. *Day,* 34 F. (2d) 920; *Whitfield* v. *Hanges,* 222 Fed. 745.

The statute plainly authorizes the imposition of the fine only if it shall appear, to the satisfaction of the Secretary, that the existence of the disease or disability for which the alien was excluded, "might have been detected by means of a competent medical examination" at the time of sailing. That § 9 imposed upon the Secretary the official duty and responsibility of making such a determination was held by both courts below and is not questioned by the Government. Accordingly, his action in particular cases is subject to judicial review, within the limits mentioned. Whether, as was suggested in the *Stranahan* case, *supra,* 332, 342, Congress, while adhering to the statutory declaration that the fine is incurred only when the alien's disease or disability could have been detected by competent medical examination at the point of embarkation, might constitutionally provide that the certificate of the examining physician at the port of entry should be conclusive as to that fact, we need not determine. We think it clear, despite language in the *Stranahan* case intimating a different view, that the statute, as it has been consistently construed administratively,[2] con-

[2] Ever since the promulgation by the Department of Commerce and Labor, in January, 1905, of Department Circular No. 58, the administrative regulations have provided for a hearing. See Immigration Regulations of July 1, 1907, Rule 28, amended December, 1910; Immigration Rules of November 15, 1911, Rule 28, amended

templates that the Secretary should fairly determine, after a hearing and upon the evidence, the facts establishing its violation.

Hence, we pass to the petitioner's remaining contention, that the action of the Secretary here in determining liability was arbitrary and unfair. In all of the cases before us the Secretary's decision was supported by at least one item of evidence. It was the certified opinion of the examining physicians of the Health Department, based upon a physical examination of the alien in the proceeding in which his admissibility was determined, that at an earlier date, that of embarkation, the existence of the disease with which he was afflicted upon arrival might have been detected by competent medical examination. This opinion as to the physical condition of the alien at the time and place of embarkation was not accompanied by a statement of the facts observed. Nevertheless, it was some evidence tending to establish the discoverability of the disease at the time of embarkation.

In all the cases but that of Fusco the evidence presented to the Secretary, in support of the petitioner's contention that the disease or disability could not have been discovered by competent medical examination at the point of embarkation, consisted of the general statement in the protests that it was the practice of the company to conduct such an examination and, in a few instances, that the alien had received a consular visa. Petitioner argues

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October, 1915; Immigration Rules of May 1, 1917, Rule 28, amended August, 1922; Immigration Rules of February 1, 1924, Rule 22; Immigration Rules of July 1, 1925, Rule 22; Immigration Rules of March 1, 1927, Rule 22; Immigration Rules of January 1, 1930, Rule 23.

During this time the general provisions of § 9 of the Act of 1903, 32 Stat. 1213, 1215, have been reënacted three times. § 9, Act of 1907, 34 Stat. 898, 901; § 9, Act of 1917, 39 Stat. 874, 880; § 26, Act of 1924, 43 Stat. 153, 166.

that the alien must have received a medical examination in order to secure the visa. But, the protest did not assert that such was the fact, or invite the Secretary to consider it. No details were presented showing the nature or results of any medical examination claimed to have been made before sailing.

As the protests were not rejected by the Secretary, the facts they disclosed were properly before him and were evidence which, in an administrative proceeding, must be considered and acted upon by the administrative officer. *Vajtauer* v. *United States, supra; Tang Tun* v. *Edsell, supra.* But we cannot say, on the records before us, that the Secretary did not consider them, as such, for what they were worth, regarding the official medical certificates as conflicting evidence entitled to greater weight. No ground exists, therefore, for setting aside his determination in these cases. The only question is the weight of the evidence, as to which the Secretary's conclusion is final. Compare *Zakonaite* v. *Wolf, supra.*

In the case of Fusco, affidavits were submitted along with the protest and the two together tended to show with some certainty that the alien had been subjected to three medical examinations shortly before embarkation, once by the Royal Italian Immigration Service in Naples, once by a physician there enjoying the confidence of the American Consul, whose certificate was available to the Secretary, and once by petitioner's own ship physician, all of whom found the immigrant in good health.

The letter imposing the fine in the *Fusco* case does not show definitely whether the Secretary considered the evidence submitted by petitioner. It recites in one place, "The alien gave no history of the disease. Indeed, he was not questioned with regard thereto, and the only evidence in the record is the official certificate itself," and in another, "It is believed that the evidence placed in the record by the company is not sufficient to call into ques-

tion the accuracy of the opinion expressed in the official medical certificate." We need not inquire whether this ambiguity in the record of itself requires the administrative determination to be set aside. Cf. *Tod* v. *Waldman,* 266 U. S. 113, 119, 120; *Mahler* v. *Eby,* 264 U. S. 32, 43; *Kwock Jan Fat* v. *White, supra,* 464. For the same result must follow if the record is considered, whichever way the doubt is resolved. If the Secretary failed to consider evidence before him, he exceeded his authority. If he treated the protest and affidavits as evidence relevant to the issue of the discoverability of the immigrant's disease at the time of sailing, but, nevertheless, chose to rely upon the certified opinion of the examining physicians at Ellis Island, we think that more is involved than the weighing of the evidence, and that his determination cannot stand. For the medical opinions did not reveal the facts upon which they were based, and they were formulated by physicians who, so far as appears, were not apprised of the fact that three previous examinations of the nature described had been made. The detailed information as to those examinations which petitioner submitted to the Secretary in this case might reasonably have affected the expert judgment of the physicians at Ellis Island. In relying upon their opinion alone, without putting these additional facts before them, we think the Secretary acted arbitrarily and unfairly.

The Act of Congress confers on the Secretary great power, but it is not wholly uncontrolled. It is a power which must be exercised fairly, to the end that he may consider all evidence relevant to the determination which he is required to make, that he may arrive justly at his conclusion, and preserve such record of his action that it may be known that he has performed the duty which the law commands. Suppression of evidence or its concealment from a party whose rights are being determined by the administrative tribunal, has been held to be so unfair

as to invalidate the administrative proceeding. *Kwock Jan Fat* v. *White, supra; Lewis* v. *Johnson,* 16 F. (2d) 180. It is equally offensive to conceal from the experts, whose judgment is accepted as controlling, facts which might properly have influenced their opinion.

Petitioner makes contentions, with respect to several of the cases, which require special consideration. They embrace the cases of aliens with physical defects affecting their ability to earn a living, aliens who came to the United States with a transit visa for the purpose of passing through the United States to their ultimate destination, Canada, and the case of an alien who came to the United States to enroll as a member of the crew of a vessel to be taken back to Italy. All entered or sought to enter the United States, and all were afflicted with a disease or disability specified in the statute. That their admissibility could not be determined in advance of their reaching the United States, that they were not seeking to remain permanently within the United States, are immaterial in the face of the express language of the statute, which imposes the penalty for bringing them here. See *Elting* v. *North German Lloyd,* decided this day, *ante,* p. 324.

Crimi, who was blind, a disability which might affect his ability to earn a living, came to the United States as a student. He had a consular visa under § 4 (e) of the Act of 1924, c. 190, 43 Stat. 155, 8 U. S. C., § 204, which exempts from the quota students coming to the United States to attend an accredited school. To exempt the alien from the quota under § 4 (e), the school which he comes to attend must have been approved by the Department of Labor, and a list of such accredited schools is supplied to all American consuls. The alien was excluded because he did not come for the purpose of study at an accredited school. The petitioner insists that it was entitled, on the basis of the consular visa, to assume that the alien was admissible. But § 16 of the applicable Im-

migration Act of 1924, c. 190, 43 Stat. 163, 8 U. S. C., § 216, imposes the fine for bringing any quota immigrant, which Crimi was found to be, having a non-quota visa. It provides that the fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that the vessel or transportation company "could not have ascertained, by the exercise of reasonable diligence" that the individual transported was a quota immigrant. The consular visa did not make Crimi a non-quota immigrant entitled to enter. Immigration Act of 1924, § 2 (g), 8 U. S. C., § 202 (g). To secure remission of the fine, the statute placed upon petitioner the burden of establishing to the satisfaction of the Secretary, that it could not have been ascertained by the exercise of reasonable diligence that the alien was a quota immigrant. Compare *Elting* v. *North German Lloyd, supra.* We cannot say that the Secretary did not have ground for holding that reasonable inquiry of the alien or the Consul issuing the visa would have disclosed to petitioner that the alien was not coming to the United States for the purpose of studying in an accredited school.

The judgment will be reversed as to the tenth cause of action and affirmed as to all the others.

Reversed in part.

COSTANZO v. TILLINGHAST, COMMISSIONER OF IMMIGRATION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 110. Argued November 17, 18, 1932.—Decided December 5, 1932.

1. Where, in a proceeding in habeas corpus challenging the legality of an order of deportation under the Immigration Act of 1917, it appears that the action of the Secretary of Labor in issuing the order was supported by evidence, his findings are not subject to review by the courts. P. 342.

2. Section 19 of the Immigration Act of 1917 imposes no period of limitation with respect to the deportation of an alien found managing a house of prostitution, and an alien may be taken into custody and deported for this cause at any time after entry. P. 343.
3. Rules of syntax should not be so applied in construing a statute as to defeat the evident legislative intent. P. 344.
4. A statute must be considered in its entirety in order not to give undue effect to particular words or clauses. P. 345.
5. The failure of Congress to alter or amend a statute, notwithstanding a consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, which is entitled to great weight. P. 345.

56 F. (2d) 566, affirmed.

CERTIORARI * to review the affirmance of a decree dismissing a writ of habeas corpus.

Mr. William H. Lewis for petitioner.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher, Assistant Attorney General Dodds,* and *Messrs. Harry S. Ridgely* and *Albert E. Reitzel* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Section 19 of the Act of February 5, 1917,[1] directs, *inter alia,* the deportation of any alien who manages a house of prostitution. The petitioner, a citizen of Italy, was arrested, given a hearing, and ordered deported as such a manager. By writ of *habeas corpus* he challenged the legality of the order. The District Court dismissed the writ, and the Circuit Court of Appeals affirmed the decree.

A claim of violation of constitutional rights made in the court below has been abandoned. The Circuit Court of Appeals properly negatived the asserted absence of any evidence to support the action of the Secretary of Labor,

* See Table of Cases Reported in this volume.

[1] Ch. 29, 39 Stat. 874, 889.

and therefore refused, as we do, to review that officer's findings. *Low Wah Suey* v. *Backus*, 225 U. S. 460, 468; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275; *Tisi* v. *Tod*, 264 U. S. 131, 133; *Vajtauer* v. *Commr. of Immigration*, 273 U. S. 103, 106.

Certiorari was granted to resolve a question as to the construction of § 19 of the Act of 1917, which the petitioner says authorized deportation for the cause assigned only within the five years ensuing entry. He entered this country much more than five years prior to the issuance of the warrant for his arrest.

The section, containing nearly nine hundred words, is a single sentence, divided by semi-colons and colons into clauses, qualified by five provisos. The opening clause is: "That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law;" and the predicate or final clause is, "shall, upon the warrant of the Secretary of Labor, be taken into custody and deported." Inserted between these, and separated from the first and from each other by semicolons, are eleven subject-clauses each referring to variously described aliens, as "any alien who" etc., and each having as its predicate the clause above quoted, "shall be taken into custody," etc. The evident purpose is to catalogue in one omnibus section the different classes of aliens who may be deported and thus avoid repetition of the predicate verbs.

The dispute is as to whether the qualifying phrase of the first clause, "within five years after entry," is to be carried over from the clause in which it appears and is to be read into each following subject clause, including that applicable to the petitioner, or is to be limited in effect to its own clause. The petitioner urges that the grammatical structure of the sentence and the punctuation require the adoption of the first alternative, while in support of the second the Government appeals to the evident mean-

ing of the entire section, the legislative history, and settled departmental interpretation.

It is to be noted that of the eleven clauses following the first, three contain references to periods of time after entry within which the described aliens may be deported. Thus, with reference to the classes which may be shortly defined as "anarchists" and "convicts," the phrase used is "at any time after entry"; concerning those who have entered without inspection, the limitation is "at any time within three years after entry." Respecting the remaining seven categories contained in as many separate clauses (including that applicable to this case, "any alien who manages . . . any house of prostitution . . . ;") no words of time are employed. Certainly, then, the five year limitation of the first clause does not apply to all the subsequent ones; and since the phrase has a proper office in qualification of the class specified in the clause in which it appears, its effect should be limited to that class and not carried over to the others.

It has often been said that punctuation is not decisive of the construction of a statute. *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77; *Ford* v. *Delta & Pine Land Co.*, 164 U. S. 662; *Barrett* v. *Van Pelt*, 268 U. S. 85; *United States* v. *Shreveport Grain & Elevator Co.*, *ante*, p. 77. Upon like principle we should not apply the rules of syntax to defeat the evident legislative intent.

The meaning of the sentence is made even plainer by the third proviso, which is:

"*Provided, further,* That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: . . ."

There is nothing upon which this proviso may operate if such of the preceding clauses as contain no time limitation are qualified by the words of the first fixing the limitation at five years; not so, however, if each clause

containing a time limitation is read separately as an exception to the general rule declared by the proviso. We must look to the whole of the section, in order not to give undue effect to particular words or clauses (*Brown* v. *Duchesne,* 19 How. 183, 194; *Pollard* v. *Bailey,* 20 Wall. 520, 525), and when so read the proviso precludes a construction which would carry into all subsequent clauses the five year limitation contained in the first.

If more were needed, the legislative history of § 19 shows that it is a compilation of earlier acts specifying different grounds for deportation; that in the prior legislation affecting aliens managing houses of prostitution, etc., no time limitation was included and that in combining those acts to form the present section Congress did not intend to impose a period of limitation with respect to this cause for deportation.[2] The administrative interpretation, as evidenced by the applicable Rules of the Bureau of Immigration adopted in 1917 and carried forward in later regulations, has been uniform to the effect that no time limitation is applicable in a case like the present.[3] The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492.

The judgment is

Affirmed.

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[2] Act of March 26, 1910, c. 128, § 2, 36 Stat. 263; Senate Report No. 352, to accompany H. R. 10384 (64th Cong., 1st Sess.).

[3] Rules of Bureau of Immigration, May 1, 1917 (1st ed., May, 1917), rule 22; 2d ed., November, 1917; 3d ed., March, 1919; 4th ed., February, 1920; 5th ed., December, 1920; 6th ed., September, 1921; 7th ed., August, 1922. See, also, Rules of the Bureau of Immigration, February 1, 1924, p. 31, and of July 1, 1925, p. 63.

PORTER, AUDITOR, *v.* INVESTORS SYNDICATE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA. (ON REHEARING.)

No. 627 (October Term, 1931). Reargued November 14, 1932.—Decided December 5, 1932.

Section 1 of Article IV of the Montana Constitution, dealing with the separation of the legislative, executive, and judicial powers, does not preclude the exercise by the state district courts of the administrative powers which were considered upon the former decision of this case. P. 347.

UPON rehearing of the case reported in 286 U. S., p. 461. The decision previously made is adhered to.

Mr. T. H. MacDonald for appellant.

Mr. M. S. Gunn for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this cause, reversing the decree of the United States District Court, we held [286 U. S. 461] that the appellee had failed to exhaust the administrative remedy afforded by the Montana statute, and that the federal court was therefore without jurisdiction as a court of equity to enjoin enforcement of the State Auditor's order.

The appellee has presented a petition for rehearing which concedes the correctness of our ruling that the statute gives a remedy partly administrative in character, by suit in the state district court, but contends that by this grant the act violates Article IV, § 1, of the Montana Constitution, which is:

"The powers of the government of this State are divided into three distinct departments: The Legislative,

Executive, and Judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

As this question was not briefed or argued when the case was first heard we granted a reargument; and the cause has again been presented on this point.

The statute plainly affords a remedy which, though in certain respects judicial, is in others administrative. The courts of Montana have not passed upon its constitutionality as affected by the quoted section of the fundamental law of the State. Such expressions of the Supreme Court as have been brought to our attention indicate that Article IV, § 1, does not forbid the conference on the state district courts of administrative powers in connection with and ancillary to their judicial functions. *O'Neill* v. *Yellowstone Irrigation Dist.*, 44 Mont. 492; 121 Pac. 283; *State* v. *Johnson*, 75 Mont. 240, 249; 243 Pac. 1073. Compare *State ex rel. Kellogg* v. *District Court*, 13 Mont. 370; 34 Pac. 298; *Hillis* v. *Sullivan*, 48 Mont. 320; 137 Pac. 392.

An adjudication of the question by the state supreme court would bind us, *Gulf C. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503. In the absence of such decision we are reluctant to construe a state constitution, *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298; but as our decision requires that the alleged conflict of state statute and state constitution be resolved we must pass upon it. *Southern Ry. Co.* v. *Watts*, 260 U. S. 519, 522. In view of the Montana cases to which reference has been made, we are not convinced that the statute is offensive to the Montana Constitution, and adhere to the judgment heretofore entered.

SHAPIRO *v.* WILGUS ET AL., RECEIVERS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 40. Argued November 10, 1932.—Decided December 5, 1932.

1. To prevent disruption of his business by suits of hostile creditors and to cause the assets to be nursed for the benefit of all concerned, a debtor in Pennsylvania, where the law permits appointment of a receiver for the business of a corporation but not for that of an individual, caused a corporation to be formed in Delaware and conveyed to it all of his property in exchange for substantially all of its shares and its covenant to assume payment of his debts. Three days later, joined with a simple contract creditor, he sued the corporation in a federal court in Pennsylvania, invoking jurisdiction on the ground of diversity of citizenship, and, with the consent of the corporation, obtained on the same day a decree appointing receivers and enjoining executions and attachments. *Held:*

   (1) That the conveyance and the receivership were fraudulent in law as against non-assenting creditors. P. 353.

   (2) A creditor who shortly after the decree brought an action resulting in a judgment against the debtor in a Pennsylvania state court, was entitled to an order either for payment out of the assets held by the receivers or for leave to issue execution. P. 357.

   (3) Refusal to grant relief in either of these forms was an abuse of discretion. *Id.*

2. A conveyance made with intent to hinder and delay creditors, though with no intent to defraud them, is illegal under the Statute of Elizabeth (13 Eliz., c. 5) and under the Uniform Fraudulent Conveyance Act, adopted in Pennsylvania. P. 354.

3. In any case not covered by the Uniform Fraudulent Conveyance Act, in Pennsylvania, the Statute of Elizabeth is still the governing rule. *Id.*

4. It is a general rule in the federal courts that a creditor who seeks appointment of receivers must first reduce his claim to judgment and exhaust his remedy at law. P. 355.

5. Departures from this rule, though allowed in some cases where the defendant acquiesces, are to be jealously watched. P. 356.

55 F. (2d) 234, reversed.

CERTIORARI, 286 U. S. 538, to review the affirmance of an order refusing permission to levy an execution from a state court upon property in possession of receivers appointed by the federal court.

Mr. Jacob Weinstein for petitioner.

Mr. Sidney E. Smith for the respondents.

There was no attempt to substitute the corporation as debtor. Nothing was done which deprived, or was intended to deprive, any creditor of the security afforded by the assets as they existed immediately before the formation of the corporation. In the face of the assumption of the liabilities by the corporation, the petitioner could not claim that the property was placed beyond the reach of creditors.

The formation of the corporation and the transfer to it of the assets was not a " conveyance," as that word is used in §§ 2, 4 and 5 of the Uniform Fraudulent Conveyance Act. If, however, it be assumed that the legislature intended that the changing of one's method of doing business should be considered a " conveyance," in no way does this transaction fit the other requirements of the Act.

It is not asserted that Robinson was made insolvent by the transfer to the corporation. On the contrary, he was solvent after the transfer by the sum of $100,000.00.

Nowhere is it alleged that any fictitious value had been placed upon the assets transferred. He received two valuable considerations for this " conveyance ": capital stock of the corporation, and the agreement of the corporation to assume all liability for and to pay every debt that Robinson owed.

Robinson did not evidence any intention to engage in any business or transaction other than the business in which he had theretofore been engaged. He maintained complete and sole control of the business. It is admitted

that his very purpose was to continue the business which he had theretofore carried on as an individual with exactly the same assets.

The application for the appointment of a receiver for the corporation is not evidence of an intent to defeat the claims of Robinson's creditors or to hinder and delay them fraudulently. The effect of the appointment was to make it impossible for Robinson or anyone else to remove the assets from the reach of creditors. All of the property, subject as it was to liability for all of the debts, was thereby placed in the hands of the Court which held it for the benefit of all parties interested and as their rights then existed.

The petitioner at the time of this action had no lien or claim against the specific property. Even if there had been a fraudulent transfer in fact, the petitioner would have been compelled to institute an action in order to acquire a lien against the fund. To say that under the circumstances this petitioner is entitled to the demand he makes, would be to controvert the thoroughly grounded rule that one of the purposes of a receivership is the restraining of indiscriminate levies and executions, in order that the property involved may be preserved from dissipation and waste and equal distribution be made to those entitled.

It is settled law in Pennsylvania that a transaction which has for its object the payment of all creditors, and which places them on an equal footing, is not fraudulent. *Wilt* v. *Franklin,* 1 Binn. 502, 513, 515; *Lippincott* v. *Barker,* 2 Binn. 174, 183, 184; *M'Allister* v. *Marshall,* 6 Binn. 338, 347; *M'Clurg* v. *Lecky,* 3 P. & W. 83, 91; *York County Bank* v. *Carter,* 38 Pa. 446, 453; *Bentz* v. *Rockey,* 69 Pa. 71, 76, 77; *Lake Shore Banking Co.* v. *Fuller,* 110 Pa. 156, 162, 163; *Werner* v. *Zierfuss,* 162 Pa. 360, 365, 366; *Miller* v. *Shriver,* 197 Pa. 191, 195; *Shibler* v. *Hartley,* 201 Pa. 286, 287, 288; *Love* v. *Clayton,* 287 Pa. 205, 215.

Some of the cases cited above go to the extent of holding that the transaction is valid notwithstanding that particular creditors are preferred.

The formation of the corporation did not operate to confer a colorable jurisdiction upon the district court of the United States. Jud. Code, § 37; U. S. C., Tit. 28, § 80, is inapplicable. *Black & White Taxicab Co.* v. *Brown & Yellow Co.*, 276 U. S. 518, 524, 525; *Re Metropolitan Ry. Receivership*, 208 U. S. 90, 110, 111.

Miller & Lux v. *East Side Canal Co.*, 211 U. S. 293; *Southern Realty Co.* v. *Walker*, 211 U. S. 603; *Lehigh Mining Co.* v. *Kelly*, 160 U. S. 327, are not applicable to the present case. In all of those cases there was an actual fraud on the court. In none was the nominal plaintiff the real party in interest. In all, control of the litigation and the property remained in the hidden parties. In the case at bar, both parties plaintiff had a real and substantial interest and were acting to protect their respective separate interests. Nothing appears to justify the contention that the formation of the corporation was for the purpose of obtaining a receivership. The reverse is demonstrated by the admitted fact that Robinson originally formed the corporation for the purpose of continuing in corporate form the business in which he had engaged. The parties are actual parties in interest and the subject matter presented in the application for appointment of the receivers was real and substantial.

The objection that the complainant McLean was improperly joined as a party complainant for the reason that he is a simple contract creditor is without foundation. *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491.

Mr. Justice Cardozo delivered the opinion of the Court.

The petitioner, a judgment creditor of Herbert P. Robinson, made application in due form to a United States

District Court in Pennsylvania praying that leave be granted him to levy an execution upon property in the possession of receivers appointed by that court. An order refusing such leave was affirmed by the Circuit Court of Appeals for the Third Circuit. 55 F. (2d) 234. The case is here on certiorari.

From the record and the admissions of counsel these facts appear. Herbert P. Robinson was engaged in business in Philadelphia as a dealer in lumber. He was unable to pay his debts as they matured, but he believed that he would be able to pay them in full if his creditors were lenient. Indeed, he looked for a surplus of $100,000 if the business went on under the fostering care of a receiver. Most of the creditors were willing to give him time. Two creditors, including the petitioner, were unwilling, and threatened immediate suit. Thus pressed, the debtor cast about for a device whereby the business might go on and the importunate be held at bay. He had to reckon with obstructions erected by the local law. The law of Pennsylvania does not permit the appointment of a receiver for a business conducted by an individual as distinguished from one conducted by a corporation or a partnership. *Hogsett* v. *Thompson,* 258 Pa. St. 85; 101 Atl. 941. To make such remedies available there was need to take the title out of Robinson and put it somewhere else. The act responded to the need. On January 9, 1931, the debtor brought about the formation of a Delaware corporation, the Miller Robinson Company. On the same day he made a conveyance to this company of all his property, real and personal, receiving in return substantially all the shares of stock and a covenant by the grantee to assume the payment of the debts. Three days later, on January 12, 1931, in conjunction with a simple contract creditor, he brought suit against the Delaware corporation in the federal court, invoking the jurisdiction of that court on the ground of diversity of

citizenship. The bill of complaint alleged that creditors were pressing for immediate payment; that one had entered suit and was about to proceed to judgment; that the levy of attachments and executions would ruin the good will and dissipate the assets; and that the business, if protected from the suits of creditors and continued without disturbance could be made to pay the debts and yield a surplus of $100,000 for the benefit of stockholders. To accomplish these ends there was a prayer for the appointment of receivers with an accompanying injunction. The corporation filed an answer admitting all the averments of the bill and joining in the prayer. A decree, entered the same day, appointed receivers as prayed for in the complaint, and enjoined attachments and executions unless permitted by the court. Four days thereafter, on January 16, 1931, the petitioner began suit against Robinson in the Court of Common Pleas, and on February 4, 1931, recovered a judgment against his debtor for $1,007.65 upon a cause of action for money loaned. On February 26, 1931, he submitted a petition to the United States District Court in which he charged that the conveyance from Robinson to the corporation and the ensuing receivership were parts of a single scheme to hinder and delay creditors in their lawful suits and remedies, and he prayed that he be permitted to issue a writ of *fieri facias* against the chattels in the possession of the receivers and to sell them so far as necessary for the satisfaction of his judgment. The petition was denied, and the denial affirmed upon appeal.

The conveyance and the receivership are fraudulent in law as against non-assenting creditors. They have the unity of a common plan, each stage of the transaction drawing color and significance from the quality of the other; but, for convenience, they will be considered in order of time as if they stood apart. The sole purpose of the conveyance was to divest the debtor of his title and

put it in such a form and place that levies would be averted. The petition to issue execution and the answer by the receivers leave the purpose hardly doubtful. Whatever fragment of doubt might otherwise be left is dispelled by the admissions of counsel on the argument before us. One cannot read the opinion of the Court of Appeals without seeing very clearly that like admissions must have been made upon the argument there. After a recital of the facts the court stated in substance that the aim of the debtor was to prevent the disruption of the business at the suit of hostile creditors and to cause the assets to be nursed for the benefit of all concerned. Perceiving that aim and indeed even declaring it, the court did not condemn it, but found it fair and lawful. In this approval of a purpose which has been condemned in Anglo-American law since the Statute of Elizabeth (13 Eliz., ch. 5), there is a misconception of the privileges and liberties vouchsafed to an embarrassed debtor. A conveyance is illegal if made with an intent to defraud the creditors of the grantor, but equally it is illegal if made with an intent to hinder and delay them. Many an embarrassed debtor holds the genuine belief that if suits can be staved off for a season, he will weather a financial storm, and pay his debts in full. *Means* v. *Dowd,* 128 U. S. 273, 281. The belief, even though well founded, does not clothe him with a privilege to build up obstructions that will hold his creditors at bay. This is true in Pennsylvania under the Uniform Fraudulent Conveyance Act, which became a law in that state in 1921. Purdon's Pennsylvania Digest, Title 39, § 357. It is true under the Statute of Elizabeth (13 Eliz., ch. 5) which, in any case not covered by the later act, is still the governing rule. Purdon's Pennsylvania Digest, Title 39, § 361; *McKibbin* v. *Martin,* 64 Pa. St. 352, 356; *Stern's Appeal,* 64 Pa. St. 447, 450. Tested by either act, this conveyance may not stand. *Hogsett* v. *Thompson, supra; Mont-*

gomery Web Co. v. *Dienelt,* 133 Pa. St. 585; 19 Atl. 428; *Atlas Portland Cement Co.* v. *American Brick & Clay Co.,* 280 Pa. St. 449; 124 Atl. 650; *In re Elletson Co.,* 174 Fed. 859, affirmed 183 Fed. 715; *Kimball* v. *Thompson,* 4 Cush. 441, 446; *Dearing* v. *McKinnon Dash Co.,* 165 N. Y. 78; 58 N. E. 773; *Means* v. *Dowd, supra.*

The conveyance to the corporation being voidable because fraudulent in law, the receivership must share its fate. It was part and parcel of a scheme whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design. *Harkin* v. *Brundage,* 276 U. S. 36; *Decker* v. *Decker,* 108 N. Y. 128, 135, 15 N. E. 307. The design would have been ineffective if the debtor had been suffered to keep the business for himself. *Hogsett* v. *Thompson, supra.* It did not gain validity when he transferred the business to another with a capacity for obstruction believed to be greater than his own. The end and aim of this receivership was not to administer the assets of a corporation legitimately conceived for a normal business purpose and functioning or designed to function according to normal business methods. What was in view was very different. A corporation created three days before the suit for the very purpose of being sued was to be interposed betweeen its author and the creditors pursuing him, with a restraining order of the court to give check to the pursuers. We do not need to determine what remedies are available for the conservation of the assets when a corporation has been brought into existence to serve legitimate and normal ends. Ordinarily a creditor who seeks the appointment of receivers must reduce his claim to judgment and exhaust his remedy at law. The Uniform Fraudulent Conveyance Act may have relaxed that requirement in many of the states (Purdon's Pennsylvania Digest, Title 39, §§ 351, 359, 360; cf. New York Debtor and Creditor Law, Article 10; Consol. Laws, c. 12; *American Surety Co.*

v. *Conner,* 251 N. Y. 1; 166 N. E. 783), but the rule in the federal courts remains what it has always been. *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 497; *Scott* v. *Neely,* 140 U. S. 106; *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 379; *Matthews* v. *Rodgers,* 284 U. S. 521, 529. True indeed it is that receivers have at times been appointed even by federal courts at the suit of simple contract creditors if the defendant was willing to waive the irregularity and to consent to the decree. This is done not infrequently where the defendant is a public service corporation and the unbroken performance of its services is in furtherance of the public good. *Re Metropolitan Railway Receivership,* 208 U. S. 90, 109, 111. It has been done at times, though the public good was not involved, where legitimate private interests might otherwise have suffered harm. *United States* v. *Butterworth-Judson Corp.,* 269 U. S. 504, 513; *Krugsport Press* v. *Brief English Systems,* 54 F. (2d) 501; *Harkin* v. *Brundage, supra,* p. 52. We have given warning more than once, however, that the remedy in such circumstances is not to be granted loosely, but is to be watched with jealous eyes. *Michigan* v. *Michigan Trust Co.,* 286 U. S. 334, 345; *Harkin* v. *Brundage, supra.* Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public policy of the state or the locality. It is one thing for a creditor with claims against a corporation that is legitimately his debtor to invoke the aid of equity to conserve the common fund for the benefit of himself and of the creditors at large. *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 380. Whatever hindrance and delay of suitors is involved in such a remedy may then be incidental and subsidiary. It is another thing for a debtor, coöperating with friendly creditors, to bring the corporation into being with the hindrance and delay of suitors the very aim of its existence. The power to intervene before the legal

remedy is exhausted is misused when it is exercised in aid of such a purpose. Only exemplary motives and scrupulous good faith will wake it into action.

The receivership decree assailed upon this record does not answer to that test. We have no thought in so holding to impute to counsel for the debtor or even to his client a willingness to participate in conduct known to be fraudulent. The candor with which the plan has been unfolded goes far to satisfy us, without more, that they acted in the genuine belief that what they planned was fair and lawful. Genuine the belief was, but mistaken it was also. Conduct and purpose have a quality imprinted on them by the law.

There remains a question of procedure. The prayer of the petitioner was that he be permitted to issue execution upon his judgment in the state court. Cf. *Wiswall* v. *Sampson*, 14 How. 52. If there had been any substantial doubt that the conveyance and the receivership were voidable obstructions, the federal court might have refused to permit the tangle to be unraveled in the courts of the state. It might have retained the controversy in its own grasp and made a decision for itself. But in truth there was no substantial doubt as to the quality of conveyance and receivership, no genuine issue to be tried. In such circumstances the petitioner was entitled to an order in the alternative either for the payment of his judgment out of the assets in the hands of the receivers or in default thereof for leave to issue execution. The refusal to grant relief in one or other of these forms is a departure from the bounds of any legitimate discretion which is not without redress.

The decree is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

GREAT NORTHERN RAILWAY CO. *v.* SUNBURST OIL & REFINING CO.

CERTIORARI TO THE SUPREME COURT OF MONTANA.

No. 53. Argued November 11, 1932.—Decided December 5, 1932.

1. Where the state law prescribes freight rates through a Board but allows a shipper who has paid at a rate so fixed an action for overcharges when the Board, afterwards, on his complaint and on sufficient evidence, finds such rate excessive and lowers it for the future, judgment for the shipper does not impair any federal right of the railroad, since the law, making the rate thus tentative, was the basis of the contract of shipment. Pp. 360–361.
2. The result is the same whether the tentative character of the rate, and the right of recovery, are expressed in the words of the statute or were attached to it by a construction of the state supreme court before the parties contracted. P. 362.
3. If a statute as construed by the state court does not impair a party's federal right, a decision applying the construction to him on the ground of *stare decisis* but rejecting it for future cases can not do so. P. 363.
4. It is for the state courts to decide whether changes in their views of the common or statutory law shall apply to intermediate transactions. P. 364.
5. A federal claim first raised by petition for rehearing in a state court is in time for purposes of review if the occasion for it arose unexpectedly from the grounds of the state court's decision. P. 366.

91 Mont. 216; 7 P. (2d) 927, affirmed.

CERTIORARI * to review the affirmance of a judgment against the railway company in a suit for overcharges.

Mr. J. P. Plunkett, with whom *Mr. R. J. Hagman* was on the brief, for petitioner.

Mr. George E. Hurd submitted for respondent.

* See Table of Cases Reported in this volume.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

Sunburst Oil & Refining Company, the respondent, brought suit against petitioner, Great Northern Railway Company, to recover payments claimed to be overcharges for freight. The charges were in conformity with a tariff schedule approved by the Railroad Commission of Montana for intrastate traffic. After payment had been made, the same Commission which had approved the schedule held, upon a complaint by the shipper, that the rates so approved were excessive and unreasonable. In this action to recover the excess so paid, the shipper recovered a judgment which was affirmed upon appeal. 91 Mont. 216; 7 P. (2d) 927. The question, broadly stated, is whether the annulment by retroaction of rates valid when exacted is an unlawful taking of property within the Fourteenth Amendment. A writ of certiorari brings the case here.

By a statute of Montana the Board of Railroad Commissioners is empowered to fix rates of carriage for intrastate shipments. The rates thereby established are not beyond recall. They may be changed by the Board itself on the complaint either of shipper or of carrier if found to be unreasonable. Revised Codes of Montana, § 3796. In an action against the Board they may be set aside upon a like showing by a judgment of the court. §§ 3809, 3810. Until changed or set aside, they "shall prima facie be deemed to be just, reasonable and proper." § 3810.

The meaning of the statute was considered by the Supreme Court of Montana in a cause determined in May, 1921. *Doney* v. *Northern Pacific Ry. Co.*, 60 Mont. 209; 199 Pac. 432. A shipper of lumber brought suit against a carrier to recover transportation charges which were alleged to be unreasonable, though they were in accord-

ance with the published tariff. He did this without a preliminary application to the Board to modify the schedule. He did it without a preliminary suit in which the Board, being brought into court as a defendant, would have opportunity to sustain the schedule and resist the change. The court held that until one of these preliminary conditions had been satisfied, no action for restitution could be maintained against the carrier. It coupled that decision with the statement that upon compliance with one or other of the conditions, the excess, thus ascertained, might be the subject of recovery.

The procedure there outlined was followed by this respondent. It filed a complaint with the Board to the effect that the existing tariff for the carriage of crude petroleum distillate was excessive and unreasonable in that the rate of 20½ cents was based upon an estimated weight of 7.4 pounds per gallon, whereas the actual weight is not more than 6.6 pounds per gallon. The Board sustained the complaint. In doing so it ruled, in conformity with the decision in the *Doney* case, that the published schedule prescribed the minimum and the maximum to which carrier and shipper were required to adhere while the schedule was in force, but that by the true construction of the statute the duty of adherence was subject to a condition or proviso whereby annulment or modification would give a right of reparation for the excess or the deficiency. The revision of the tariff was followed by this suit against the carrier, and later by a judgment for the shipper which is now before us for review.

The appeal to the Supreme Court of Montana was heard at the same time as an appeal in another cause involving a like question, and the two were decided together though with separate opinions. *Montana Horse Products Co.* v. *Great Northern Ry. Co.*, 91 Mont. 194; 7 P. (2d) 919; *Sunburst Oil & Refining Co.* v. *Great*

Northern Ry. Co., 91 Mont. 216; 7 P. (2d) 927. The court held that the ruling in the *Doney* case was erroneous and would not be followed in the future; that a rate established by the Commission had the same effect as one established by the legislature; that the statute giving power to the Commission or the court to declare a rate unreasonable was not to be read as meaning that a declaration of invalidity should apply to intermediate transactions; but none the less that the ruling in the *Doney* case was law until reversed and would constitute the governing principle for shippers and carriers who, during the period of its reign, had acted on the faith of it. An opinion handed down upon a motion for rehearing restates the rationale of the decision, and perhaps with greater clearness. 91 Mont. 213, 7 P. (2d) 926; 91 Mont. 221, 7 P. (2d) 929. We are thus brought to the inquiry whether the judgment thus rendered does violence to any right secured to the petitioner by the federal constitution.

The subject is likely to be clarified if we divide it into two branches. Was a federal right infringed by the action of the trial court in adhering to the rule imposed upon it in the *Doney* case by the highest court of the state? If there was no infringement then, did one come about later when the Supreme Court of Montana disavowed the rule of the *Doney* case for the future, but applied it to the past?

1. The trial court did not impair a federal right by giving to a statute of the state the meaning that had been ascribed to it by the highest court of the state, unless such impairment would have resulted if the meaning had been written into the statute by the legislature itself. But plainly no such consequence would have followed if that course had been pursued. The *Doney* case was decided, as we have seen, in 1921. The transactions complained of occurred between August, 1926, and August, 1928. Carrier and shipper understood at that time that

the rates established by the Commission as the delegate of the legislature were provisional and tentative. Valid for the time being the rates indubitably were, a prop for conduct while they stood, but the prop might be removed, and charges, past as well as present, would go down at the same time. By implication of law there had been written into the statute a notice to all concerned that payments exacted by a carrier in conformity with a published tariff were subject to be refunded if found thereafter, upon sufficient evidence, to be excessive and unreasonable. The Constitution of the United States would have nothing to say about the validity of a notice of that tenor written in so many words into the body of the act. Carrier and shipper would be presumed to bargain with each other on the basis of existing law. *Coombes* v. *Getz*, 285 U. S. 434. The validity of the notice is no less because it was written into the act by a process of construction. *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32. The inquiry is irrelevant whether we would construe the statute in the same way if the duty of construction were ours and not another's. *Knights of Pythias* v. *Meyer*, *supra*, p. 33. Enough for us that the construction, whether we view it as wise or unwise, does not expose the court that made it to the reproach of withholding from the carrier the privileges and immunities established by the constitution of the nation.

Arizona Grocery Co. v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, holds nothing to the contrary. This court in disposing of that case was not dealing with any question of constitutional law. It was construing a federal statute. Congress had delegated to the Interstate Commerce Commission the power to fix rates and to revoke them. The holding was that the grant of power to revoke did not include by fair intendment a power to invalidate by relation the rates established in the past. The opinion of the court does not speak of the constitution, but

plants itself upon the statute, and from that source and no other derives its energy. In none of its pages is there a hint, much less a holding, that a denial of due process would result from the declaration of provisional rates if the will to make them provisional had been written into the Commerce Act, and written there in advance of carriage and of payment. The essence of such a system is that under it rates can be "experimentally laid down and experimentally tried out." Hutcheson, J., in *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. (2d) 443, 447. The statute of Montana differs in many ways from the act considered by this court. We do not need to ask ourselves the question whether the differences, to our thinking, are important or trivial. There might be no differences at all, and still the meaning of the Montana statute would be a problem for the Montana courts, and not one for us after they had had their say.

2. If the carrier did not suffer a denial of due process through the action of the trial court in subjecting the published tariff to the doctrine of the *Doney* case then standing unimpeached, the petitioner, to prevail, must be able to show that a change was brought about through something done or omitted by the Supreme Court of Montana in deciding the appeal.

We think the posture of the case from the viewpoint of constitutional law was the same after the decision of the appeal as it was after the trial. There would certainly have been no denial of due process if the court in affirming the judgment had rendered no opinion or had stated in its opinion that the *Doney* case was approved. The petitioner is thus driven to the position that the Constitution of the United States has been infringed because the *Doney* case was disapproved, and yet, while disapproved, was followed. Adherence to precedent as establishing a governing rule for the past in respect of the meaning of a statute is said to be a denial

of due process when coupled with the declaration of an intention to refuse to adhere to it in adjudicating any controversies growing out of the transactions of the future.

We have no occasion to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of *stare decisis* as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the federal constitution. This is not a case where a court in overruling an earlier decision has given to the new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing. Even that may often be done, though litigants not infrequently have argued to the contrary. *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 450; *Fleming* v. *Fleming,* 264 U. S. 29; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 680; cf. *Montana Bank* v. *Yellowstone County,* 276 U. S. 499, 503. This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.

We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. *Tidal Oil Co.* v. *Flanagan, supra*), that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. *Gelpcke* v. *Dubuque,* 1 Wall. 175; *Douglass* v. *County of Pike,* 101 U. S. 677, 687; *Loeb* v. *Columbia Township Trustees,* 179 U. S. 472, 492; *Harris* v. *Jex,* 55 N. Y. 421; *Menges* v. *Dentler,* 33 Pa. St. 495, 499; *Commonwealth* v. *Fidelity & Columbia Trust Co.,* 185 Ky. 300; 215 S. W. 42; *Mason* v. *Cotton Co.,* 148 N. C. 492, 510; 62 S. E. 625; *Hoven* v.

McCarthy Bros. Co., 163 Minn. 339; 204 N. W. 29; *Farrior* v. *New England Mortgage Security Co.*, 92 Ala. 176; 9 So. 532; *Falconer* v. *Simmons*, 51 W. Va. 172; 41 S. E. 193.[1] On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. *Tidal Oil Co.* v. *Flanagan, supra; Fleming* v. *Fleming, supra; Central Land Co.* v. *Laidley*, 159 U. S. 103, 112; see, however, *Montana Bank* v. *Yellowstone County, supra.*[2] The alternative is the same whether the subject of the new decision is common law (*Tidal Oil Co.* v. *Flanagan, supra*) or statute. *Gelpcke* v. *Dubuque, supra; Fleming* v. *Fleming, supra.* The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew.

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[1] Other cases have been collected in the writings of learned authors: Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409, 421; Freeman, Retroactive Operation of Decisions, 18 Col. L. Rev. 230; Carpenter, Court Decisions and the Common Law, 17 Col. L. Rev. 593; also 29 Harv. L. Rev. 80.

[2] Cf. Gray, Nature and Sources of the Law, §§ 535–550; Holmes, J., in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 371.

Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process.

There is still to be considered a question of jurisdiction which has been reserved till this stage of the opinion, for the answer to it becomes easier after a consideration of the merits has brought into clear relief the challenge to the judgment. The first mention of the Fourteenth Amendment to be found in the record is in the petition for rehearing, where also there is a statement that the constitutional question was presented on the first hearing of the appeal and is now renewed and amplified. The answer to the petition for rehearing by counsel for the respondent is also in the record and contains what is in substance an admission that the constitutional point had been duly made at the time and in the manner stated by the moving party. The court in denying the application did so by reference to its opinion on a similar motion in a companion suit decided at the same time (*Montana Horse Products Co.* v. *Great Northern Ry. Co., supra*), and nowhere in that opinion did it contest the statement of counsel that the effect of the Fourteenth Amendment had been argued at every stage. We have then in the record what is in essence the stipulation of counsel followed by the acquiescence of the court. Whether this without more avoids the application of the general rule that a constitutional question is urged too late if put forward for the first time upon a petition for rehearing (*American Surety Co.* v. *Baldwin, ante,* p. 156; *Godchaux Co.* v. *Estopinal,* 251 U. S. 179), we are not

required to determine, for here there is more, and that enough to bring the case within a well-recognized exception. The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered and decided (*Consolidated Turnpike Co.* v. *Norfolk & O. V. Ry. Co.*, 228 U. S. 326, 334; *Cumberland Coal Co.* v. *Board*, 284 U. S. 23), nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 678; *Missouri ex rel. Missouri Insurance Co.* v. *Gehner*, 281 U. S. 313, 320; *American Surety Co.* v. *Baldwin, supra.* This case is clearly within the second of these exceptions, if it is not also within the first. We have seen that the assault upon the judgment is made along two lines. The first is a challenge to the constitutional validity of the ruling in the *Doney* case, and involves a misconception of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co., supra.* The second is a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others. This latter objection the petitioner could not make in advance of the event.

The judgment of the Supreme Court of Montana is accordingly

Affirmed.

CORTES, ADMINISTRATOR, v. BALTIMORE INSULAR LINE, INC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 12. Argued November 16, 1932.—Decided December 5, 1932.

1. Injury suffered by a seaman in the course of his employment, as the result of failure of the master of the ship to furnish him care or cure when stricken by pneumonia, is a "personal injury" from

"negligence," within the purview of § 33 of the Merchant Marine Act, supplemented by the Federal Employers' Liability Act, for which that section gives a right of action, by the seaman if living or by his personal representative if the injury result in death. Pp. 371–373.

2. The fact that the duty of master and of shipowner to furnish care and cure to a seaman in case of illness is a duty arising from and attached to the contractual relation of employment, for the breach of which the seaman has, under the general maritime law, a cause of action *ex contractu,* is not inconsistent with allowing him also, at his election, a statutory action *ex delicto* when neglect of the duty results in impairment of body or mind; still less inconsistent with allowing such an action to his personal representative (who could not otherwise sue) if the injury causes death. P. 372.
3. After the voyage has begun, with care and cure cut off from an ill seaman unless furnished by officers and crew, withdrawal from the relation from which springs the duty is impossible, and abandonment is a tort. Pp. 374.
4. Section 33 of the Merchant Marine Act should be liberally construed in aid of its purpose to protect seamen and those dependent on their earnings. P. 375.
5. When a duty imposed by law for the benefit of the seaman and for the promotion of his health or safety has been neglected, to the damage of his person, his remedy, under § 33 of the Merchant Marine Act, is the same as though a like duty had been imposed by law upon carriers by rail. Pp. 376–378.

52 F. (2d) 22, reversed.

CERTIORARI, 285 U. S. 535, to review the reversal of a judgment for damages, recovered against the steamship company by the petitioner, as administrator of the estate of a deceased seaman.

Mr. Basil O'Connor for petitioner.

Mr. Geo. Whitefield Betts, Jr., for respondent.

The contract right of a seaman to maintenance and cure, whether or not the condition requiring it was caused by the master's negligence, is so different from any right or duty of the servant or master on shore that common-law causes involving master and servant relations on land

are of little help in the solution of the question here. The cases hold that there is no general duty at common law owed by the master to the servant to furnish medical services, but in some jurisdictions a limited duty to provide emergency relief, and then only while the emergency lasts.

On the other hand, under the law of the sea, the obligation to furnish maintenance in addition to cure extends for a reasonable period after the seaman has left the ship and is on shore. See the case of *Reed* v. *Canfield,* 1 Sumner 195, where the obligation was extended to medical treatment and expenses of a seaman for more than a year after he had left the ship. When we consider that not only the cure but the maintenance of the seaman, together with a lien therefor on the ship, *The Montezuma,* 19 F. (2d) 355, are given under the law of the sea for such extended periods after the relationship ends and where the injury to the seaman was not connected with any negligence on the part of the vessel, it is easily understood why Congress did not intend, when the Jones Act was passed, to add to the shipowner's burdens by engrafting on the law of maintenance and cure a remedy for loss of life. The difficulties presented, even to an intelligent and careful master at sea, in the case of hidden ailments of his crew, are another reason for leaving the law as it has stood for over a century.

The cause of action for failure to provide cure has been considered a contractual relation since the decisions of Judge Story over a hundred years ago. Prior to the passage of the Jones Act, in 1920, no cause of action was given to a seaman arising out of negligence except in cases of unseaworthiness of the vessel. In cases brought after the Jones Act, no recovery has been granted under that Act for failure to provide cure, so far as counsel have been able to ascertain, and this Court, in its opinions, has clearly intimated that Congress did not intend in the Jones Act to interfere with the maritime law rules involving the doctrine of maintenance and cure.

The language of the Jones Act itself and the history of its passage indicate that Congress was endeavoring to change the maritime law by giving to seamen the rights then enjoyed by railroad employees in respect to accidents, namely, in abolishing the fellow servant defense and in applying the common law rule of *respondeat superior.* Congress did not intend, in using the term "personal injury," to embrace cases involving the treatment of an illness and Congress did not intend, in using the word "negligence," to cover cases involving the breach of the implied contract to provide maintenance and cure.

The reversal and dismissal of the complaint should be sustained, as the proof failed to show that plaintiff's intestate's death was caused by respondent's negligence.

In no event can the judgment of the District Court be reinstated without modification, as there was error in including interest on the verdict from the date of the death.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

Santiago, a seaman, shipped on the respondent's vessel for a voyage from the harbor of New York to Boca Grande, Florida, and return. On the home voyage, he fell ill of pneumonia, and died in a hospital after reaching the home port. His administrator, the petitioner, sued to recover damages for his death, which was charged to have been caused by the failure of the master of the ship to give him proper care. In the District Court there was a judgment for the petitioner, which was reversed upon appeal. The reversal was on the ground that the seaman's right of action for negligent care or cure was ended by his death, and did not accrue to the administrator for the use of next of kin. 52 F. (2d) 22. The case is here on certiorari.

By the general maritime law a seaman is without a remedy against the ship or her owners for injuries to his person, suffered in the line of service, with two exceptions

only. A remedy is his if the injury has been suffered as a consequence of the unseaworthiness of the ship or a defect in her equipment. *The Osceola,* 189 U. S. 158; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Pacific Co.* v. *Peterson,* 278 U. S. 130, 134. A remedy is his also if the injury has been suffered through breach of the duty to provide him with "maintenance and cure." The duty to make such provision is imposed by the law itself as one annexed to the employment. *The Osceola, supra.* Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident. If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. *The Iroquois,* 194 U. S. 240. On the other hand, the remedy for the injury ends with his death in the absence of a statute continuing it or giving it to another for the use of wife or kin. *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 240; *Lindgren* v. *United States,* 281 U. S. 38, 47. Death is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land.

The question then is to what extent the ancient rule has been changed by modern statute. Section 33 of the Merchant Marine Act of 1920, commonly known as the Jones Act [1] (41 Stat. 1007, § 33; 46 U. S. Code, § 688),

[1] "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by

gives a cause of action to the seaman who has suffered personal injury through the negligence of his employer. For death resulting from such injury it gives a cause of action to his personal representative. We are to determine whether death resulting from the negligent omission to furnish care or cure is death from personal injury within the meaning of the statute.

The argument is pressed upon us that the care owing to a seaman disabled while in service is an implied term of his contract, and that the statute cannot have had in view the breach of a duty contractual in origin for which he had already a sufficient remedy under existing rules of law.

We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more. The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties. For breach of a duty thus imposed, the remedy upon the contract does not exclude an alternative remedy built upon the tort. The passenger in a public conveyance who has been injured by the negligence of the carrier, may sue for breach of contract if he will, but also at his election in trespass on the case. *Jackson* v. *Old Colony Street Ry.*, 206 Mass. 477, 485; 92 N. E. 725; *Busch* v. *Interborough R. T. Co.*, 187 N. Y. 388, 391; 80 N. E. 197; *Rich* v. *New York Central & H. R. R. Co.*, 87 N. Y. 382, 390; *Neil* v. *Flynn Lumber Co.*, 71 W. Va. 708; 77 S. E.

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jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

Compare the act of March 30, 1920, c. 111, § 1, 41 Stat. 537, 46 U. S. Code, § 761, "Death on the High Seas by Wrongful Act," which extends to persons other than seamen, but is limited to suits in admiralty.

324; cf. the cases cited in Pollock on Torts (13th ed.), p. 557 *et seq.* The employee of an interstate carrier injured through the omission to furnish him with safe and suitable appliances may have a remedy under the Federal Employers' Liability Act (45 U. S. Code § 51), or at times under the Safety Appliance Act (45 U. S. Code, §§ 1 to 6), though the omission would not be actionable in the absence of a contract creating the employment. So, in the case at hand, the proper subject of inquiry is not the quality of the relation that gives birth to the duty, but the quality of the duty that is born of the relation. If the wrong is of such a nature as to bring it by fair intendment within the category of a "personal injury" that has been caused by the "negligence" of the master, it is not put beyond the statute because it may appropriately be placed in another category also.

We are thus brought to the inquiry whether "negligence" and "personal injury" are terms fittingly applied to the acts charged to the respondent. The case is helped by illustrations. Let us suppose the case of a seaman who is starved during the voyage in disregard of the duty of maintenance with the result that his health is permanently impaired. There is little doubt that in the common speech of men he would be said to have suffered a personal injury, just as much as a child in an orphan's home who had been wronged in the same way. Cf. *Queen* v. *Instan,* [1893] 1 Q. B. 450. Let us suppose the case of a seaman slightly wounded through his own fault, but suffering grievous hurt thereafter as a consequence of septic poisoning brought about by lack of treatment. The common speech of men would give a like description to the wrong that he had suffered. The failure to provide maintenance or cure may be a personal injury or something else according to the consequences. If the seaman has been able to procure his maintenance and cure out of his own or his friends' money, his remedy

is for the outlay, but personal injury there is none. If the default of the vessel and its officers has impaired his bodily or mental health, the damage to mind or body is none the less a personal injury because he may be free at his election to plead it in a different count. Cf. *Pacific Co.* v. *Peterson, supra,* pp. 137, 138. Nor is liability escaped by appeal to the distinction between acts of omission on the one hand and those of commission on the other. *Moch Co.* v. *Rensselaer Water Co.,* 247 N. Y. 160, 167, 168; 159 N. E. 896. A division is sometimes drawn between the termination of a relation at a time when it is still executory or future, and its termination when performance has gone forward to such a point that abandonment of duty becomes an active agency of harm. *Moch Co.* v. *Rensselaer Co., supra.* The respondent is not helped though its treatment of the seaman be subjected to that test. Here performance was begun when the vessel started on her voyage with Santiago aboard and with care and cure cut off from him unless furnished by officers or crew. From that time forth withdrawal was impossible and abandonment a tort. Given a relation involving in its existence a duty of care irrespective of a contract, a tort may result as well from acts of omission as of commission in the fulfilment of the duty thus recognized by law. *Moch Co.* v. *Rensselaer Water Co., supra,* citing Pollock on Torts, (13th ed.), p. 567; *Kelly* v. *Metropolitan Ry. Co.,* [1895] 1 Q. B. 944.

We are told, however, that the personal injury from negligence covered by the statute must be given a narrow content, excluding starvation and malpractice, because for starvation and malpractice the seaman without an enabling act had a sufficient remedy before. The seaman may indeed have had such a remedy, but his personal representative had none if the wrong resulted in his death. While the seaman was still alive, his cause of action for personal injury created by the statute may have

overlapped his cause of action for breach of the maritime duty of maintenance and cure, just as it may have overlapped his cause of action for injury caused through an unseaworthy ship. *Pacific Co.* v. *Peterson, supra,* p. 138; *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, 321, 324. In such circumstances it was his privilege, in so far as the causes of action covered the same ground, to sue indifferently on any one of them. The overlapping is no reason for denying to the words of the statute the breadth of meaning and operation that would normally belong to them, at all events when a consequence of the denial is to withhold any remedy whatever from dependent next of kin. A double remedy during life is not without a rational office if the effect of the duplication is to carry the remedy forward for others after death. The argument for the respondent imputes to the lawmakers a subtlety of discrimination which they would probably disclaim. There was to be a remedy for the personal representative if the seaman was killed by the negligent omission to place a cover over a hatchway or to keep the rigging safe and sound. There was to be none, we are told, if he was killed for lack of food or medicine, though the one duty equally with the other was attached by law to the relation. This court has held that the act is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings. *Jamison* v. *Encarnacion,* 281 U. S. 635. An assault by one member of the crew upon another with a view to hurrying up the work has been brought within the category of "negligence," and hence in a suit against the owner becomes an actionable wrong. *Jamison* v. *Encarnacion, supra; Alpha S. S. Corp.* v. *Cain,* 281 U. S. 642. Approaching the decision of this case in a like spirit of liberality, we put aside many of the refinements of construction that a different spirit might approve.

The failure to furnish cure is a personal injury actionable at the suit of the seaman during life, and at the suit of his personal representative now that he is dead. Cf. *U. S. Shipping Board E. F. Corp.* v. *Greenwald,* 16 F. (2d) 948.

We are warned, however, that in giving this content to the statute we are omitting to give heed to its reference to the act regulating the remedies of railroad employees, and are ignoring the standards of duty thus carried over and adopted. The Employers' Liability Act for the protection of the employees of common carriers by railroad gives a remedy to such employees "for injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier," or by reason of any negligent defect in its roadbed or equipment. 35 Stat. 65, § 1; 45 U. S. Code, § 51. True indeed it is that a common carrier by land is not subject to a duty, except in special circumstances, to give maintenance or cure to sick or disabled employees. We say except in special circumstances, for it would be hazardous to assert that such a duty may not rest upon the representative of a railroad as well as upon the master of a ship when the servant, exposed by the conditions of the work to extraordinary risks, is helpless altogether unless relief is given on the spot. *Ohio & Mississippi Ry. Co.* v. *Early,* 141 Ind. 73, 81; 40 N. E. 257; *Shaw* v. *Chicago, M. & St. P. Ry. Co.,* 103 Minn. 8; 114 N. W. 85; *Raasch* v. *Elite Laundry Co.,* 98 Minn. 357; 108 N. W. 477; *Hunicke* v. *Meramec Quarry Co.,* 262 Mo. 560, 581, 597; 172 S. W. 43.[2] The result, however, will not be different though we assume that the servant of a railroad company, if he has been injured without fault, may never call for help as due to him of right, however pressing the emergency and im-

[2] The authorities are brought together and carefully discriminated by Prof. Francis H. Bohlen, in an article "Moral Duty to Aid Others as Basis of Tort Liability," in 56 University of Penn. L. Rev. 217, 316, reprinted in his "Studies in the Law of Torts," pp. 290, 315.

perative the need. We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This court has said that "the ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly." *Robertson* v. *Baldwin*, 165 U. S. 275, 287. Another court has said: "The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited." *Scarff* v. *Metcalf*, 107 N. Y. 211, 215; 13 N. E. 796. Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection. There is doubt, and that substantial, whether the administrator of a railroad engineer who by misadventure has fallen from his locomotive while the train is on a bridge has a cause of action under the Federal Employers' Liability Act because of the failure of the crew of the train to come to the rescue of their comrade. *Harris* v. *Penn. R. R. Co.*, 50 F. (2d) 866, 868.[3] There is little doubt that rescue is a duty when a sailor falls into the sea, *United States* v. *Knowles*, 4 Sawy. 517, and that a liability to respond in damages is cast upon the shipowners if he is abandoned to his fate. *Harris* v. *Penn. R. R. Co.*, *supra*.

The act for the protection of railroad employees does not define negligence. It leaves that definition to be filled in by the general rules of law applicable to the conditions in which a casualty occurs. Cf. *Murray* v. *Chicago & N. W. Ry. Co.* 62 Fed. 24, 31; *Ward* v. *Erie R. Co.*, 230 N. Y. 230, 234; 129 N. E. 886; *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 343. Congress did not mean

[3] Compare again the authorities collected by Bohlen in his "Studies in the Law of Torts," p. 312.

that the standards of legal duty must be the same by land and sea. Congress meant no more than this, that the duty must be legal, i. e., imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail.

The Court of Appeals in its reversal of the District Court assumed without deciding that the care of the seaman had been negligent and that there was a causal relation between the negligence and the death. The correctness of that assumption is challenged by counsel for the shipowner. These issues of fact being still open and undecided should be disposed of by the court below.

The judgment is reversed and the cause remanded to the Court of Appeals for further proceedings in conformity with this opinion.

Reversed.

STERLING, GOVERNOR OF TEXAS, ET AL. *v.* CONSTANTIN ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Nos. 11 and 453. Argued November 15, 16, 1932.—Decided December 12, 1932.

1. The Governor of a State is subject to the process of the federal courts for the relief of private persons when by his acts under color of state authority he invades rights secured to them by the Federal Constitution. P. 393.
2. The suit is not a suit against the State. *Id.*
3. In a suit to restrain a state official from violating federal constitutional rights by action under color of state law, the fact that it may appear that he exceeded his authority under that law does not deprive the District Court of jurisdiction. *Id.*

4. In a suit to restrain a state official from invading property rights under color of state constitutional and statutory provisions, where the validity of such provisions, if construed to authorize the acts complained of, is challenged by the plaintiff under the Federal Constitution, the application for an injunction is properly heard by the District Court of three judges. P. 393.
5. In such a case, the jurisdiction of the three judge District Court, and of this Court on appeal from a decree of injunction, extends to every question involved, whether of state or of federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. P. 393.
6. Whether or not the constitution and laws of Texas purport to authorize the acts of the Governor complained of in this case, is *not decided.* In disposing of the federal question, such authority is assumed to have existed. P. 394.
7. The right of a lessee of oil land to extract oil pursuant to his lease, subject to reasonable regulation by the State in the exercise of its power to prevent unnecessary loss, destruction and waste, is protected by the due process clause of the Fourteenth Amendment. P. 396.
8. The existence of facts justifying an exertion of military power by the Governor of a State is subject to judicial inquiry when there is a substantial showing that such exertion has overridden private rights secured by the Federal Constitution. P. 398.
9. The Governor of Texas proclaimed "martial law" over several oil-producing counties of the State, declaring that insurrection and riot beyond civil control existed there, due to wasteful production of oil by some of the operators in defiance of the state conservation law and to violent public feeling thereby excited. After shutting down all of the wells by military force, he permitted the state commission that administers the conservation law to fix the limit of production, and production was resumed accordingly; but when some of the operators, the plaintiffs in this case, objecting to that limit as infringing their property rights under the Fourteenth Amendment, obtained a restraining order in a suit against the commission in the federal court, he took military control of all of the wells and restricted production still further. *Held:*

   (1) The question whether an exigency existed justifying such interference with the plaintiffs' rights was not settled exclusively by the Governor's acts and declarations but was subject to judicial inquiry and determination. Pp. 398–403.

   (2) The facts of the situation (set forth in the opinion) show no such exigency, and the interference was properly enjoined. *Id.*

10. The fact that a violation of private rights by a state Governor is attributable to a military order does not limit the relief to proceedings calling him to account after the passing of the alleged emergency on which he claims to have acted; an injunction will be granted if essential for protection of the injured party. P. 403.
11. The general language of an opinion must be taken in connection with the point actually decided,—referring to *Moyer* v. *Peabody*, 212 U. S. 78. P. 400.
12. Appeal from an order granting an interlocutory injunction will be dismissed when there is also an appeal from a final decree making the injunction permanent. P. 386.

No. 11 dismissed; No. 453 affirmed.

APPEALS from an order of interlocutory injunction granted by a three-judge District Court, restraining the Governor and certain military officials of Texas from enforcing military orders restricting the production of plaintiffs' oil wells, and from a final decree of the same court making the injunction permanent. The opinion of the court below is reported in 57 F. (2d) 227.

Messrs. E. F. Smith and *Dan Moody*, with whom *Mr. Paul D. Page, Jr.*, was on the brief, for appellants.

If the federal Constitution and laws vest in the President the power to declare "martial law" (see dissenting opinion of Chief Justice Chase in *Ex parte Milligan*, 4 Wall. 2, 132), then the like provisions of the constitution and laws of Texas confer a similar power upon the Governor.

While the power is necessarily an overriding one, since its use is intended to be exercised in times of peril for the preservation of the government, its extent and the danger of its abuse do not argue against its existence. *Martin* v. *Mott*, 12 Wheat. 19, 32; *Luther* v. *Borden*, 7 How. 1.

In re Moyer, 35 Colo. 159, sustains the position that the constitution and statutes of Texas empower the Governor to proclaim "martial law." See also *Moyer* v. *Peabody*, 212 U. S. 78.

Under "martial law" the Governor may call out the troops; may order them to kill persons who resist and may cause offenders and insurrectionists to be restrained of their liberty. Regardless of whether in the cases last cited the proclamation of the Governor of Colorado established a state of "martial law" in name, it appears from the opinion of this Court and from the opinion of the Supreme Court of Colorado, that the Governor had a power under his proclamation that could be exercised by him only under "martial law." Cf. *Ex parte McDonald,* 49 Mont. 454. See *United States* v. *Wolters,* 268 Fed. 69.

Throughout the years the several constitutions of Texas have each provided that the Chief Executive should, among other things, be Commander-in-Chief of the military forces of the State, and have enjoined upon him the responsibility of causing the laws to be executed. It was intended that this government should at all times be able to enforce its laws, continue its existence as an organized government, and have the power to accomplish both in the face of vicious lawlessness. This necessary and inherent power of self defense has been reposed in the Chief Executive by the constitution and statutes. If not there, it exists only in the people; and so to hold would be to say that in the organization of the government of Texas—a border State—no provision was made for the common defense.

If the term "martial law" arouse prejudice or evoke the spectre of usurpation, then the term may be abandoned, and yet the constitution and statutes are sufficient to repose in the Governor authority to use the military forces to repel invasion and suppress insurrection; and to effect that end he may cause persons to be restrained of their liberty and, where necessary, cause life or property to be taken.

The courts will not in injunction proceedings inquire into the sufficiency of the facts to sustain the Governor's

declaration that an insurrection exists, or into the motive of the Governor in making the declaration. *Moyer* v. *Peabody,* 212 U. S. 78; *Martin* v. *Mott,* 12 Wheat. 19; *Luther* v. *Borden,* 7 How. 1; *Stewart* v. *Kahn,* 11 Wall. 493; *Keely* v. *Sanders,* 99 U. S. 441; *Marbury* v. *Madison,* 1 Cranch 137; 2 Story, Const., p. 110, 2d ed.; *Consolidated Coal & Coke Co.* v. *Beale,* 282 Fed. 934; *In re Moyer,* 35 Colo. 159; *Chapin* v. *Ferry,* 3 Wash. 386; *Mayes* v. *Brown,* 71 W. Va. 519; *Ex parte Jones,* 71 W. Va. 567; *In re Boyle,* 6 Idaho 609; *Franks* v. *Smith,* 142 Ky. 232; 2 Story, Const., § 1211, 2d ed.

To argue that the courts have the power so to inquire is to argue out of the state constitution the provision separating the powers of government into departments. And this applies as well to the federal courts as to the courts of Texas; for the guarantee of republican form of government to every State imposes a duty upon the Congress and the President and not upon the judiciary.

"Martial law" is an exercise of the police power; to judge of the need for it, is an executive prerogative. The due process clause of the Fourteenth Amendment was not designed to interfere with the power of the State to protect the lives, liberties and properties of its citizens. *Barbier* v. *Connolly,* 113 U. S. 27; *Pacific Gas & Elec. Co.* v. *Police,* 251 U. S. 22; *Compagnie* v. *Louisiana,* 186 U. S. 380.

Any attempt of the courts to control the manner in which the Governor uses the military forces in the face of an emergency brought about by insurrection would be a clear invasion by one department of fields properly belonging to another coördinate department. *Franks* v. *Smith,* 142 Ky. 232; *Martin* v. *Mott,* 12 Wheat. 19; *Stewart* v. *Kahn,* 11 Wall. 493; *Burnquist* v. *Minnesota,* 168 N. W. 634; Pomeroy, Const. L., 1870 ed., p. 483; *United States* v. *Fischer,* 280 Fed. 208.

If the Executive is vested with the discretion to determine the exigency requiring the declaration of "martial law," it logically follows that the Executive together with the officers in charge of his military forces are to determine the use of soldiers that is necessary to make the proclamation effective. There may be a responsibility after the emergency has passed for a wrongful decision and an unlawful order and a consequent invasion of a private right. *Hartranft's Appeal,* 85 Pa. St. 433.

If the Executive act as a tyrant or despot, he is, as suggested in some of the cases, subject to impeachment. If his use of the power destroy a republican government, the United States has power to restore it. *Moyer* v. *Peabody,* 212 U. S. 78; *In re Boyle,* 6 Idaho 609; *Wadsworth* v. *Shortall,* 206 Pa. St. 165; *Mayes* v. *Brown,* 71 W. Va. 519.

The Executive must have the authority to make his proclamation effective. The courts have said that he may make the ordinary use of troops. The expression certainly implies that he may use his troops to go to the fountain head of the insurrection and suppress the insurrection by removing its cause. If the Executive determined, as in this case, that the cause of the trouble was the operation of oil wells, he would have power to end the insurrection by removing its cause through controlling the operation of the wells as in his judgment the situation might require.

The decision of the Governor that the taking of private property is necessary to prevent impending or suppress existing insurrection etc., is conclusive. A taking under such circumstances is with due process of law. Power to do a thing necessarily implies power to do all things necessary to do the principal thing. *Mitchell* v. *Harmony,* 13 How. 115; *United States* v. *Russell,* 13 Wall. 623. The power to take private property, when necessary, of

course, implies authority to determine when the taking is necessary. *Martin* v. *Mott,* 12 Wheat. 19. While due process of law in taking property may not be due process in taking life or liberty, it is certainly true that due process in taking life or liberty suffices as due process to take property. *Moyer* v. *Peabody,* 148 Fed. 870.

The taking of property where insurrection and imminent danger of insurrection exist, in order to suppress and head off insurrection, is not a taking where a hearing is demanded by due process. A taking by the Executive is an implied promise upon his part that the State will make proper compensation, and that the State is morally bound at some later date to pay to the private individual the reasonable value of his property taken during the emergency.

Mitchell v. *Harmony,* 13 How. 115, and *United States* v. *Russell,* 13 Wall. 623, are not, when analyzed, against the proposition that the Governor is the sole and exclusive judge of the necessity for taking. They are authority for saying that a verdict in this case, holding the appellants liable in damages, would not be disturbed upon appeal, but not for restraining their acts by injunction.

If the Governor, exercising his constitutional discretion, found it necessary to control the production from appellees' oil wells in order to make his proclamation effective, this finding and the subsequent control of the appellees' oil wells were consistent with due process of law. *Clearing House* v. *Coyne,* 194 U. S. 497; *Weimer* v. *Bunbury,* 30 Mich. 201.

The various proclamations and orders issued by the Governor and his testimony upon the trial are the evidence that the finding was made and show that a finding of necessity was made.

The courts may call upon him later, after the emergency, to account for what he has done, (we are not considering that question or attempting to express a view

upon it,) but while the emergency lasts they can not interpose their judgment and discretion where the law has made it the duty of the executive to use his judgment and discretion. *Mississippi* v. *Johnson*, 4 Wall. 475; *Louisiana* v. *McAdoo*, 234 U. S. 627.

The theory that under declaration of martial law the soldiers are called out to act as civil officers with no greater power than civil officers is erroneous.

Distinguishing: *Ex parte Milligan*, 4 Wall. 2. In the case at bar a competent authority had declared a defined area to be in a state of insurrection and by proclamation had instituted "martial law." *United States* v. *Adams*, 26 F. (2d) 141; *Ex parte Lavinder*, 108 S. E. 428.

Messrs. Joseph W. Bailey, Jr., and *Luther Nickels* for appellees.

The trial court, expressly or impliedly, found: First, that there was no "insurrection" or "riot," in fact, at the time of the declaration of martial law; second, that there was not at any time warrant for alleged belief of the Governor that riot or insurrection would ensue if oil production were not restricted; third, that the courts, state and national, were at all times open and their processes at all times unobstructed, "the refusal of defendant Wolters to observe the injunction in this case" being the only instance wherein there has been interference with the "civil authorities or courts . . . or their processes." The so-called executive proclamations, the appellants' pleading, and the proof amply warrant such findings.

The due process clause of the Fourteenth Amendment precludes existence of an "irrebuttable presumption" in favor of state action or action of state officers.

The constitution and statutes of Texas do not confer upon the Governor of the State the power to declare or maintain "martial law" or to do or cause to be done the acts of which complaint is made.

If any statute of Texas undertakes to confer any such authority, it is void because it conflicts with the constitution of Texas and with the contract, due process, and equal protection clauses and other provisions of the Federal Constitution.

Even if the constitution or statutes of the State undertake to confer such authority, the acts of the Governor and his subordinates were and are arbitrary, capricious, oppressive and unjust, in violation of the due process clause of the Fourteenth Amendment.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The District Court, composed of three judges (U. S. C., Tit. 28, § 380), granted an interlocutory injunction restraining the appellants, Ross S. Sterling, Governor of the State of Texas, W. W. Sterling, Adjutant General of the State, and Jacob F. Wolters, Brigadier General of the Texas National Guard, from enforcing their military or executive orders regulating or restricting the production of oil from complainants' wells and from interfering in any manner "with the lawful production of oil from complainants' property." 57 F. (2d) 227. By stipulation, causes of action set forth in the amended bill of complaint against these defendants and others were severed and the suit proceeded to trial upon the merits against these defendants separately and was submitted upon the pleadings and the evidence taken on the application for the interlocutory injunction. The court entered final judgment making the interlocutory injunction permanent, and appeals have been taken to this Court from both the interlocutory order and the final judgment. As the case is now here on the latter appeal (No. 453), the appeal from the interlocutory order (No. 11) will be dismissed. *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 224.

Complainants, as owners of interests in oil and gas leaseholds, originally brought the suit, on October 13, 1931, against members of the Railroad Commission of Texas, the Attorney General of the State, Brigadier General Wolters, and others, to restrain the enforcement of orders of the Commission limiting the production of oil. These orders were alleged to be arbitrary and illegal, as having been made in violation of the statutes of Texas and in pursuance of a conspiracy in the interest of prices, and as operating to deprive complainants of their property without due process of law contrary to both the State and the Federal constitutions. The District Judge set the application for preliminary injunction for hearing on October 28, 1931, before a specially constituted court of three judges, and meanwhile made a temporary order restraining the defendants from limiting complainants' production below 5,000 barrels per well. 57 F. (2d) p. 229. The defendants who were members of the Railroad Commission accordingly ceased their attempt to enforce the orders thus challenged.

Previously, on August 16, 1931, Governor Sterling had issued a proclamation stating that certain counties (in which complainants' properties were located) were in "a state of insurrection, tumult, riot, and a breach of the peace," and declaring "martial law" in that territory. The Governor directed Brigadier General Wolters to assume supreme command of the situation and to take such steps as he might deem necesary in order "to enforce and uphold the majesty of the law," subject to the orders of the Governor as Commander in Chief, as given through the Adjutant General. From that time, General Wolters acted as "commanding officer of said military district."

When the District Court made its temporary restraining order in this suit, as above stated, Governor Sterling, learning that the orders made by the Railroad Commis-

sion could no longer be enforced, issued his oral and written orders to General Wolters to limit the production of oil in the described military district to 165 barrels per well per day. This was the limit fixed by the Commission's order of October 10th the enforcement of which was subject to the restraining order. On October 28th, the Governor made the limit 150 barrels and on November 6th, 125 barrels. These orders were enforced by General Wolters, and contempt proceedings were brought against him.

On November 20, 1931, by leave of the District Court, complainants filed an amended bill making Governor Sterling and W. W. Sterling, Adjutant General, parties to the suit and alleging that the above mentioned military and executive orders limiting production were without justification in law or in fact, were arbitrary and capricious, and were repugnant to the State and Federal constitutions. Complainants alleged that there had been no request by the civil authorities for the use of the military forces; that all courts in said area were "open and transacting their ordinary business"; that there were "no armed bodies of civilians in said area" nor "any bodies of men threatening bloodshed, violence or destruction"; but that, on the contrary, "the citizens in said community are in a quiet, peaceable condition and amenable and obedient to any process which might be served upon them." Defendants, Governor Sterling, Adjutant General Sterling, and General Wolters, answered the bill setting forth the executive proclamation and orders, and the declaration of martial law, and asserting the validity of the acts assailed. By a supplemental petition, in response to the answer, complainants denied that the Governor, under the constitution and statutes of the State, could lawfully exercise the authority he had assumed, and specifically alleged that if any statute of the State conferred such authority it contravened stated pro-

visions of the Constitution of the State and the due process and equal protection clauses of the Fourteenth Amendment. At the time of the hearing of the application for preliminary injunction, it appeared that the executive orders had further limited the complainants' production to 100 barrels per day. 57 F. (2d) p. 229.

Upon that application, the District Court received the evidence submitted by both parties, and considering it to be "without substantial conflict," stated that it established the following facts:

In August, 1931, the Legislature of Texas passed an amended oil and conservation act. Chap. 26, Vernon's Ann. Civ. St. Texas, Arts., 6008, 6014, 6029, 6032, 6036, 6049c. The Governor in issuing his proclamation of August 16th recited the provisions of the constitution and statutes of Texas for the conservation of oil and gas and the existence in the East Texas oil field, the territory in question, of an organized group of oil and gas producers who were said to be in a state of insurrection against the conservation laws; that the civil officers did not have a sufficient force to compel them to obey; that by reason of their reckless production enormous physical waste was being created; that this condition had brought about such a state of public feeling that if the state government could not protect the public's interest they would take the law into their own hands; that this condition had caused threats of acts of violence; that it was necessary to give the Railroad Commission time to have hearings and promulgate proper orders to put the law into force; that a state of "insurrection, tumult, riot and breach of the peace existed in the defined area" and that there was "serious danger threatening to citizens and property, not only there, but in other oil producing areas of the State"; and that it was necessary "that the reckless and illegal exploitation" should be stopped until such time as the said resources might be properly conserved and developed

under the protection of the civil authorities. The troops were then called out and the oil wells were shut down. In September, after the Commission had made its order limiting production, while the proclamation of martial law was not rescinded nor the troops entirely withdrawn, the military occupation in force ended. The wells were opened and continued to produce daily under the order of the Railroad Commission. General Wolters, with the assistance of the "Rangers," the civil officers of the community, and "the few military still remaining in the field," and in aid of the Commission, patrolled the territory to see that its orders were complied with; that from time to time the Commission, sometimes with the approval, and sometimes with the disapproval, of the Governor made its orders further limiting production, and these orders were obeyed.

The District Court also found that after the restraining order against the Commission had been issued in this suit, the defendants, Governor Sterling and General Wolters, "determined not to brook court interference with the program of restricted production which they determined to continue." Acting "in the real, though mistaken, belief that the federal court, while competent as to the Commission, was during the continuance of the proclaimed state of war without jurisdiction over their action," by virtue of the claim, which the District Court found to be wholly without support in the evidence, "that war conditions were prevailing in the field, and that military necessity required the action," they "ousted the Commission from the fixing of and superintendence over the daily production allowed, and have since controlled production by purported military orders."

As to the actual conditions in the area affected by these orders the District Court made the following finding:

"It was conceded that at no time has there been any actual uprising in the territory. At no time has any mili-

tary force been exerted to put riots or mobs down. At no time, except in the refusal of defendant Wolters to observe the injunction in this case, have the civil authorities or courts been interfered with or their processes made impotent. Though it was testified to by defendants that from reports which came to them they believed that, if plaintiffs' wells were not shut in, there would be dynamiting of property in the oil fields, and efforts to close them and any others which opened by violence, and that, if that occurred, there would be general trouble in the field, no evidence of any dynamite having been used, or show of violence practiced or actually attempted, or even threatened against any specific property in the field, was offered. We find, therefore, that not only was there never any actual riot, tumult, or insurrection, which would create a state of war existing in the field, but that, if all of the conditions had come to pass, they would have resulted merely in breaches of the peace to be suppressed by the militia as a civil force, and not at all in a condition constituting, or even remotely resembling, a state of war." 57 F. (2d) p. 231.

Referring to the testimony of Governor Sterling and General Wolters that the orders had not been issued for the purpose of affecting prices, nor even *per se* to limit production, but "as acts of military necessity to suppress actually threatened war" as they believed from reports brought to them that "unless they kept the production of oil down to within 400,000 barrels, a warlike riot and insurrection, in fact a state of war, would ensue," the District Court said:

"We find no warrant in the evidence for such belief. Looking at it in the light most favorable to defendants' contention, it presents nothing more than threats of violence or breaches of the peace. The testimony showed that martial law had not ousted the commission from making and enforcing rules regulating conservation, ex-

cept alone as to production from the field. One of their witnesses testified: 'Now the Governor with his military representatives has taken over the proration end but the conservation end is still with the Commission.' The evidence shows no insurrection nor riot, in fact, existing at any time in the territory, no closure of the courts, no failure of civil authorities. It shows that at no time has there been in fact any condition resembling a state of war, and that, unless the Governor may by proclamation create an irrebuttable presumption that a state of war exists, the actions of the Governor and his staff may not be justified on the ground of military necessity." *Id.*

Having thus found the facts, the District Court, maintaining its jurisdiction, examined the provisions of the constitution and statutes of the State to ascertain whether they had conferred upon the Governor the power he had assumed to exercise. The court concluded that not only was no such affirmative authority conferred but that express provisions of the constitution withheld such power; that when the Governor calls out the troops of Texas, it is not as a military but as a civil officer; that their powers and duties are derived from the civil law; and that at no time and under no conditions are their actions above court review. The court held that, under the constitution of Texas, courts may not be closed or their processes interfered with by military orders, that courts cannot be ousted by the agencies detailed to aid them, and that their functions cannot be transferred to tribunals unknown to the constitution. In this view, the court decided that appellants "without warrant of law" had been depriving complainants of their undoubted right to operate their own properties in a prudent and reasonable way, in accordance with the laws of the State. 57 F. (2d) pp. 236–241. The final judgment, entered pursuant to the stipulation of the parties and upon the same record, rests upon the same findings and conclusions.

Appellants contend (1) that the Governor has power to declare martial law; (2) that courts may not review the sufficiency of facts upon which martial law is declared; (3) that courts may not control by injunction the means of enforcing martial law; and (4) that the finding of the Governor of necessity to take property is due process of law.

First. The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief. *Ex parte Young,* 209 U. S. 123, 155, 156; *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278, 292, 293; *Truax* v. *Raich,* 239 U. S. 33, 37, 38; *Cavanaugh* v. *Looney,* 248 U. S. 453, 456; *Terrace* v. *Thompson,* 263 U. S. 197, 214. The Governor of the State, in this respect, is in no different position from that of other state officials. See *Davis* v. *Gray,* 16 Wall. 203, 210, 233; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352; *Binford* v. *McLeaish,* 284 U. S. 598; 52 F. (2d) 151, 152; *Sproles* v. *Binford,* 286 U. S. 374. Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has exceeded the authority conferred by the State, deprive the court of jurisdiction. *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 246; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434.

As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U. S. 10. The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the

court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 191; *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298, 303; *Davis* v. *Wallace*, 257 U. S. 478, 482; *Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116.

Second. Appellants rely upon Article IV, §§ 1, 7 and 10 of the state constitution, and Articles 5778, 5830, 5834 and 5889 of the Revised Civil Statutes of the State, 1925. The provisions of the state constitution make the Governor the Chief Executive Officer of the State and Commander in Chief of its military forces, with "power to call forth the militia to execute the laws of the State, to suppress insurrections, repel invasions, and protect the frontier." The Governor "shall cause the laws to be faithfully executed." The statutes cited are set forth in the margin.[1]

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[1] "Revised Civil Statutes of Texas, 1925:

"Art. 5778. The Governor shall have power in the case of insurrection, invasion, tumult, riot or breach of peace, or imminent danger thereof, to order into the active service of this State any part of the militia that he may deem proper.

"Art. 5830. When an invasion of, or an insurrection in, this State is made or threatened, or when the Governor may deem it necessary for the enforcement of the laws of this State, he shall call forth the active militia or any part thereof to repel, suppress, or enforce the same, and if the number available is insufficient he shall order out such part of the reserve militia as he may deem necessary.

"Art. 5834. The Governor may order the active militia, or any part thereof, to assist the civil authorities in guarding the prisoners, or in conveying prisoners from and to any point in this State, or discharging other duties in connection with the execution of the law as the public interest or safety at any time may require.

"Art. 5889. Whenever any portion of the military forces of this State is employed in aid of the civil authority, the Governor, if in his judgment the maintenance of law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops are serving, or any special portion thereof, to be in a state of insurrection."

In support of the conclusion of the court below that the Governor did not have authority as extensive as that asserted in this case, appellees invoke the provisions of the Bill of Rights (Article I) of the state constitution as follows:

"Sec. 12. The writ of *habeas corpus* is a writ of right, and shall never be suspended . . . .

"Sec. 24. The military shall at all times be subordinate to the civil authority.

"Sec. 28. No power of suspending laws in this State shall be exercised except by the Legislature.

"Sec. 29. To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of the government and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void."

Appellees contend that the subsequent Articles of the Constitution are to be construed in harmony with these provisions of the Bill of Rights, and that these show clearly that it was not the intention of the people of Texas to confer upon the Governor the authority to declare martial law, but only to suppress insurrections, to repel invasions and to afford the protection necessary to preserve the peace, acting in aid, and not in subversion, of the civil authority and of the jurisdiction of the courts. These provisions, said the District Court, "were written into the fundamental law as direct inhibitions upon the executive, by men who had suffered under the imposition of martial law, with its suspension of civil authority, and the ousting of the courts during reconstruction in Texas." "In every convention," said the court, "in every gathering assembled, protesting the suppression of free speech, the interference with the processes, the judgments, the decrees of courts, these men had denounced martial tyranny, and sought relief against it, and, when they met

to adopt the constitution of 1876 which still obtains, they determined to, and they did, so write the fundamental law that such deprivations of liberty might never again occur." 57 F. (2d) p. 237.

While we recognize the force of these observations, and the question of the interpretation of the provisions of the state constitution is before us, it is still a matter of local law, as to which the courts of the State would in any event have the final word. We do not find it necessary to determine that question and we shall not attempt to explore the history of Texas or to review the decisions of the state courts cited by the appellees.[2] We pass to the consideration of the federal question presented, and for that purpose we shall assume, without deciding, that the law of the State authorizes what the Governor has done.

Third. The existence and nature of the complainants' rights are not open to question. Their ownership of the oil properties is undisputed. Their right to the enjoyment and use of these properties subject to reasonable regulation by the State in the exercise of its power to prevent unnecessary loss, destruction and waste, is protected by the due process clause of the Fourteenth Amendment. *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *Walls* v. *Midland*

[2] *Ex parte Coupland,* 26 Tex. 386; *Ex parte Turman,* 26 Tex. 708; *Ex parte Mayer,* 27 Tex. 715; *State* v. *Sparks,* 27 Tex. 627; *id.,* 705; *The Emancipation Cases,* 31 Tex. 504; *Arroyo* v. *State,* 69 S. W. 503. See, also, *Franks* v. *Smith,* 142 Ky. 232; 134 S. W. 484; *Fluke* v. *Canton,* 31 Okla. 718; 123 Pac. 1049; *Bishop* v. *Vandercook,* 228 Mich. 299; 200 N. W. 278; *In re McDonald,* 49 Mont. 454; 143 Pac. 947; *Herlihy* v. *Donohue,* 52 Mont. 601; 161 Pac. 164; *Allen* v. *Gardner,* 182 N. C. 425; 109 S. E. 260. Compare *State ex rel. Mays* v. *Brown,* 71 W. Va. 519; 77 S. E. 243; *In re Jones,* 71 W. Va. 567; 77 S. E. 1029; *Hatfield* v. *Graham,* 73 W. Va. 759; 81 S. E. 533; *Ex parte Lavinder,* 88 W. Va. 713; 108 S. E. 428; *In re Moyer,* 35 Colo. 159; 85 Pac. 190; *In re Boyle,* 6 Idaho 609; 57 Pac. 706; *Commonwealth ex rel. Wadsworth* v. *Shortall,* 206 Pa. St. 165; 55 Atl. 952.

Carbon Co., 254 U. S. 300; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210. The State, in this instance, had asserted its regulatory authority by enacting laws for the prevention of waste and had empowered the Railroad Commission to investigate and to establish rules to this end. The Commission then made its orders governing and limiting oil production. The complainants brought suit in the federal court to restrain the enforcement of these orders upon the ground that they were unauthorized, arbitrary and capricious, and violated the federal right to the enjoyment and use of the properties. Exercising the jurisdiction conferred by federal statute, a federal judge had granted a temporary restraining order, pending the convening of the court which by that statute was charged with the duty to determine whether the requirement of the Commission was valid or its enforcement should be enjoined. While this orderly process was going forward, it was superseded and in effect nullified by the Governor of the State, who undertook by military order to effect the limitation which the Commission by that process was for the time being forbidden to maintain. And when the federal court, finding his action to have been unjustified by any existing exigency, has given the relief appropriate in the absence of other adequate remedy, appellants assert that the court was powerless thus to intervene and that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.

If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would

be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the federal judicial power extends (Art. III, § 2) and, so extending, the court has all the authority appropriate to its exercise. Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a state court this duty must be performed as a necessary incident to a decision upon the claim of denial of federal right. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593; *Union Pacific R. Co.* v. *Public Service Commn.*, 248 U. S. 67, 69; *Merchants National Bank* v. *Richmond*, 256 U. S. 635, 638; *First National Bank* v. *Hartford*, 273 U. S. 548, 552, 553; *Fiske* v. *Kansas*, 274 U. S. 380, 385, 386.

Fourth. The application of these principles does not fail to take into account the distinctive authority of the State. In the performance of its essential function, in promoting the security and well-being of its people, the State must, of necessity, enjoy a broad discretion. The range of that discretion accords with the subject of its exercise. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 31:

Standard Oil Co. v. *Marysville,* 279 U. S. 582, 584; *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159. As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander in Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence. The determinations that the Governor makes within the range of that authority have all the weight which can be attributed to state action, and they must be viewed in the light of the object to which they may properly be addressed and with full recognition of its importance. It is with appreciation of the gravity of such an issue that the governing principles have been declared.

By virtue of his duty to "cause the laws to be faithfully executed," the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive. That construction, this Court has said, in speaking of the power constitutionally conferred by the Congress upon the President to call the militia into actual service, "necessarily results from the nature of the power itself, and from the manifest object contemplated." The power "is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." *Martin* v. *Mott,* 12 Wheat. 19, 29, 30. Similar effect, for corresponding reasons, is ascribed to the exercise by the Governor of a State of his discretion in calling out its military forces to suppress insurrection and disorder. *Luther* v. *Borden,* 7 How. 1, 45; *Moyer* v. *Peabody,* 212 U. S. 78, 83. The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to

make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. Thus, in *Moyer* v. *Peabody, supra,* the Court sustained the authority of the Governor to hold in custody temporarily one whom he believed to be engaged in fomenting disorder, and right of recovery against the Governor for the imprisonment was denied. The Court said that, as the Governor "may kill persons who resist," he "may use the milder measures of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief." In that case it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant, and the general language of the opinion must be taken in connection with the point actually decided. *Cohens* v. *Virginia,* 6 Wheat. 264, 399; *Carroll* v. *Carroll's Lessee,* 16 How. 275, 287; *Myers* v. *United States,* 272 U. S. 52, 142.

It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary

is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken or destroyed to prevent it from falling into the hands of the enemy or may be impressed into the public service and the officer may show the necessity in defending an action for trespass. "But we are clearly of opinion," said the Court speaking through Chief Justice Taney, "that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified." *Mitchell* v. *Harmony,* 13 How. 115, 134. See, also, *United States* v. *Russell,* 13 Wall. 623, 628. There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity.

We need not undertake to determine the intended significance of the expression "martial law," and all its possible connotations, as it was employed in the Governor's proclamation. Nor are we concerned with the permissible scope of determinations of military necessity in all their conceivable applications to actual or threatened disorder and breaches of the peace. Fundamentally, the question here is not of the power of the Governor to proclaim that a state of insurrection, or tumult, or riot, or breach of the peace exists, and that it is necessary to call military force to the aid of the civil power. Nor does the question relate to the quelling of disturbances and the overcoming of unlawful resistance to civil authority. The question before us is simply with respect to the Gover-

nor's attempt to regulate by executive order the lawful use of complainants' properties in the production of oil. Instead of affording them protection in the lawful exercise of their rights as determined by the courts, he sought, by his executive orders, to make that exercise impossible. In the place of judicial procedure, available in the courts which were open and functioning, he set up his executive commands which brooked neither delay nor appeal. In particular, to the process of the federal court actually and properly engaged in examining and protecting an asserted federal right, the Governor interposed the obstruction of his will, subverting the federal authority. The assertion that such action can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law has no support in the decisions of this Court.

Appellants' contentions find their appropriate answer in what was said by this Court in *Ex parte Milligan,* 4 Wall. 2, 124, a statement as applicable to the military authority of the State in the case of insurrection as to the military authority of the Nation in time of war: "The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will;* and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and

proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis, destroys every guarantee of the Constitution, and effectually renders the military independent of and superior to the civil power. . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."

Fifth. The argument of appellants intimates, while it reserves the question, that it may be possible for the courts to call upon the Governor, after the alleged emergency has passed, to account for what he has done, but that they may not entertain a proceeding for injunction. The suggestion confuses the question of judicial power with that of judicial remedy. If the matter is one of judicial cognizance, it is because of an alleged invasion of a right, and the judicial power necessarily extends to the granting of the relief found to be appropriate according to the circumstances of the case. Whether or not the injured party is entitled to an injunction will depend upon equitable principles; upon the nature of the right invaded and the adequacy of the remedy at law. If the court finds that the limits of executive authority have been transgressed, and that in view of the character of the injury equitable relief by injunction is essential in order to afford the protection to which the injured party is entitled, it can not be said that the judicial power is fettered because the injury is attributable to a military order.

In the present case, the findings of fact made by the District Court are fully supported by the evidence. They leave no room for doubt that there was no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit

complainants' oil production, otherwise lawful. Complainants had a constitutional right to resort to the federal court to have the validity of the Commission's orders judicially determined. There was no exigency which justified the Governor in attempting to enforce by executive or military order the restriction which the District Judge had restrained pending proper judicial inquiry. If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the federal court in the exercise of its jurisdiction and not to attempt to override it; to aid in making its process effective and not to nullify it; to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared. It is also plain that there was no adequate remedy at law for the redress of the injury and, as the evidence showed that the Governor's orders were an invasion under color of state law of rights secured by the Federal Constitution, the District Court did not err in granting the injunction.

The judgment of the District Court is affirmed.

No. 11, appeal dismissed.

No. 453, judgment affirmed.

DALTON ET AL. *v.* BOWERS, EXECUTOR.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 52. Argued November 14, 1932.—Decided December 12, 1932.

1. Under the Revenue Act of 1924, § 206, a loss not "attributable to the operation of a trade or business regularly carried on by the taxpayer" is not deductible in computing his net income for the year following that in which the loss occurred. P. 409.
2. As a general rule for tax purposes a corporation is an entity distinct from its stockholders. P. 410.

3. A taxpayer organized a corporation for the purpose of manufacturing and marketing his patented articles. He purchased all of the capital stock, expecting to sell the shares at a profit. He took active charge of the affairs of the corporation, but his individual time was devoted in large part to matters of invention. The corporation's business was unprofitable from the start, and the taxpayer withdrew no money from it. From time to time he made loans to the corporation to pay its debts and carry on its business; these loans appeared on its books, unpaid; credits were placed to his salary account; the corporation and he filed separate income tax returns; in his personal return he had claimed a reduction on account of bad debts due from it. The business failed and the corporation was dissolved. In his return for 1925 the taxpayer claimed as a loss deductible for that year the amount paid for the capital stock. *Held:*

The loss was not "attributable to the operation of a trade or business regularly carried on by the taxpayer," within the meaning of § 206 of the Revenue Act of 1924, and, having been sustained in 1924, could not be offset against a gain in 1925. Pp. 409–410.

56 F. (2d) 16, affirmed.

CERTIORARI, 286 U. S. 541, to review a judgment which reversed a judgment of the district court in favor of the petitioners here in an action to recover money paid as income taxes.

Mr. Arnold Lichtig for petitioners.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John H. McEvers* were on the brief, for respondent.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Court.

For twenty-five years petitioner Dalton has busied himself with physical research and invention; he has devised and patented hundreds of articles. A large income from sundry sources has enabled him to lay out considerable sums in connection with his inventions; the inventions

brought in no net profit after 1914. During the five years following 1912 he caused the organization of six separate corporations and transferred to each certain patents for exploitation. The last of these—the Dalton Manufacturing Corporation—was incorporated under the laws of New York in 1917; he paid for all the capital stock—$395,000.00; became a director, president, treasurer and controlled its affairs. No other person was financially interested. He testified that his primary purpose in this venture was to perfect his sundry models and patented articles and sell the corporate shares profitably; he thought it would be better to market such articles through the corporation, to have the business in corporate form; he considered the corporation as a branch or part of his own business as an inventor and dealer in patents, etc.—as a means to an end, an instrumentality of his purpose. Also, that he believed it essential thus to have his inventions manufactured and brought before the public; the corporations were used in order to develop and improve his inventions.

The Manufacturing Corporation promptly took over certain Dalton patents, manufactured the articles and sought to sell them. The petitioner endeavored to sell the corporate shares and thereby to obtain gain. From time to time he advanced large sums to pay debts and carry on the corporate business. These loans appeared on the books, but were not repaid. For six years credits were placed to his salary account; he withdrew nothing. In 1924 the Corporation became hopelessly insolvent and during 1925 passed out of existence. The evidence indicates losses during several preceding years. All creditors were paid by petitioner.

The Corporation and Dalton made separate returns for federal income taxes. In 1923 and 1924 he claimed large deductions—$157,035.50 and $162,309.24—on account of bad debts due from it.

In their joint income return for 1925 Dalton and his wife claimed a deduction of $395,000—the full amount paid for the then worthless shares of the Manufacturing Corporation. The Commissioner ruled that this loss occurred in 1924. Adjustments for that year showed $374,000.00 net loss by the Daltons. The Commissioner refused to apply this upon their 1925 return because not attributable to the operation of a trade or business regularly carried on by the taxpayer. If so applied, there would have been no taxable income for that year. Payment of $56,841.32 was demanded and made under protest. This suit to recover followed.

Petitioners maintain that the $395,000.00 loss, adjudged by the Commissioner to have occurred in 1924, was sustained in a trade or business regularly carried on by Mr. Dalton; consequently, the net loss for that year—$374,078.98—should have been deducted from the 1925 income under terms of the Revenue Act of 1924, § 206 (a) and (b), and Treasury Regulations 65, Article 1621. The District Court accepted their view; the Circuit Court of Appeals held otherwise. 56 F. (2d) 16.

The latter court said [p. 18]—

"There is no justification for saying that the business of the corporation was that of the appellee. During the period the appellee dealt with the corporation as an entity. When he paid the debts of the corporation, he drew on his personal account in favor of the corporation's account and this made the corporation his debtor. Separate tax returns were filed by the corporation and by the appellee. He purchased the capital stock with the intention of disposing of it to the public. His individual time was spent in large part in matters of invention. . . . The loss now sought to be deducted was an investment which he made in the corporation and did not occur in the operation of the trade or business regularly carried on by the appellee. . . .

"By the statute, allowing the deductions and carrying over the loss for two years, Congress intended to give relief to persons engaged in an established business for losses incurred during a year of depression in order to equalize taxation in the two succeeding and more profitable years. It was not intended to apply to occasional or isolated losses. . . .

"This taxpayer did not regard the business losses of the Dalton Manufacturing Company as his loss. The loss sustained by the appellee which he seeks to charge off is a capital investment loss. The rule is well settled that the corporation will be looked upon as a legal entity. . . ."

We agree with the conclusion of the Circuit Court of Appeals and its judgment must be affirmed.

The Revenue Act of 1924, c. 234, 43 Stat. 253, 260, (U. S. C., Title 26, § 937), provides—

"Sec. 206. (a) As used in this section the term 'net loss' means the excess of the deductions allowed by section 214 or 234 over the gross income, with the following exceptions and limitations:

"(1) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business;

"(2) In the case of a taxpayer other than a corporation, deductions for capital losses otherwise allowed by law shall be allowed only to the extent of the capital gains; . . .

"(b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called 'second year'), and if such net loss is in excess of such net income (computed

without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called 'third year'); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary."

In the courts below the petitioners unsuccessfully insisted that the loss upon sale of the corporate shares occurred in 1925 and should be offset against gains received during that year. Here that insistence is not renewed.

The claim of right to offset the net loss of 1924 against 1925 gains cannot prevail unless the requirements of the quoted section, Revenue Act of 1924, are met—the loss must have been "attributable to the operation of a trade or business regularly carried on by the taxpayer."

In support of their position petitioners say—

The losses of the Manufacturing Corporation were not the losses of the taxpayers. They do not seek to disregard the corporate entity, but respect it. Taken as a whole this entity constituted a part of the individual trade or business of Hubert Dalton. His trade or business was not merely that of inventing; it included exploiting of his inventions, putting them on a paying basis by developing, manufacturing, improving and selling them through corporations organized for that special purpose. All of these things formed a complete, comprehensive enterprise of which the Corporation was part. It was an instrumentality of the taxpayer's business. Consequently, the investment in the corporate shares was part of business regularly carried on.

Whether theoretically valid or not, this argument rests upon assumptions out of harmony with the facts disclosed by the record. Dalton was not regularly engaged in the business of buying and selling corporate stocks. He organized the Manufacturing Corporation and took over

all its shares with the intention of selling them at a profit. He treated it as something apart from his ordinary affairs, accepted credits for salaries as an officer, claimed loss to himself because of loans to it which had become worthless, and caused it to make returns for taxation distinct from his own. Nothing indicates that he regarded the corporation as his agent with authority to contract or act in his behalf. Ownership of all the stock is not enough to show that creation and management of the corporation was a part of his ordinary business. Certainly, under the general rule for tax purposes a corporation is an entity distinct from its stockholders, and the circumstances here are not so unusual as to create an exception.

Affirmed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* CLARK.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 180. Argued November 14, 1932.—Decided December 12, 1932.

The taxpayer was interested in a corporation engaged in river and harbor improvement work, as majority stockholder and president, and devoted himself largely to its affairs. He was also interested in other concerns engaged in similar work and had investments in other corporate shares. He treated the corporation as a separate entity for taxation, and made separate personal income tax returns. Through endorsement of obligations of the corporation, and sale of its stock, he suffered net losses in 1921 and 1922, for which he claimed deductions in his return for 1923. He was not in the business of endorsing or buying and selling securities. *Held:*

The losses did not result "from the operation of any trade or business regularly carried on by the taxpayer," and, under the Revenue Act of 1921, § 204, were not deductible from gains of succeeding years. P. 414.

61 App. D. C. 217; 59 F. (2d) 1031, reversed.

CERTIORARI * to review a judgment reversing a decision of the Board of Tax Appeals, 19 B. T. A. 859, which sustained an order of the Commissioner determining a deficiency in income tax. Cf. the cases next preceding and following.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John H. McEvers* were on the brief, for petitioner.

Mr. William S. Hammers for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Respondent Clark's income tax return for 1921 showed net loss exceeding $17,000; for 1922 net loss of about $5,000. He claimed these should be deducted from gains reported for 1923, under § 204 (a) and (b),[1] Revenue

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* See Table of Cases Reported in this volume.

[1] Revenue Act, 1921: "Sec. 204 (a). That as used in this section the term 'net loss' means only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer (including losses sustained from the sale or other disposition of real estate, machinery, and other capital assets, used in the conduct of such trade or business); and when so resulting means the excess of the deductions allowed by section 214 or 234, as the case may be, over the sum of the following: (1) The gross income of the taxpayer for the taxable year, (2) the amount by which the interest received free from taxation under this title exceeds so much of the interest paid or accrued within the taxable year on indebtedness as is not permitted to be deducted by paragraph (2) of subdivision (a) of section 214 or by paragraph (2) of subdivision (a) of section 234, (3) the amount by which the deductible losses not sustained in such trade or business exceed the taxable gains or profits not derived from such trade or business, (4) amounts received as dividends and allowed as a deduction under paragraph (6) of subdivision (a) of section 234, and (5) so much of

Act of 1921, c. 136, 42 Stat. 227, 231. The Commissioner of Internal Revenue ruled otherwise and the Board of Tax Appeals approved. The Court of Appeals, District of Columbia, reversed the Board's action. [61 App. D. C. 217; 59 F. (2d) 1031.] The matter is here upon certiorari.

From 1899 until 1922 respondent was closely connected with the Bowers Southern Dredging Company which did river and harbor improvement work, dredging and jetty building. He was majority stockholder, active head, after 1905 president, and devoted himself largely to its affairs. During 1921 and 1922 he was a member of three partnerships similarly engaged and often associated with the Bowers Company. Also, he owned and held as investments shares of a number of corporations. He was not in the investment business.

After 1917 the Bowers Company encountered continuous financial difficulties. To protect his interest therein, at sundry undisclosed times respondent endorsed the company's obligations to the banks. In 1921 a creditor's committee took charge and thereafter respondent conducted the corporate affairs as managing director. A new concern took over the entire assets and business in 1922.

Because of his endorsements respondent paid $68,000 for the Company during 1921. He claimed and was al-

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the depletion deduction allowed with respect to any mine, oil or gas well as is based upon discovery value in lieu of cost.

"(b) If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary."

lowed to deduct the sum thus lost upon his return for that year. During the same year he also lost $9,500 through sale of the corporation's stock and in 1922 he sustained a similar loss amounting to $92,500. For both these sums appropriate deductions were permitted.

After considering all the circumstances, the Commissioner held respondent's losses did not result "from the operation of any trade or business regularly carried on by the taxpayer," and could not be deducted from gains of succeeding years. The Board of Tax Appeals approved. Among other things, it said—

"In order for the losses here involved to be deductible in determining taxable income for 1923, they must be net losses resulting from the operation of a trade or business regularly carried on by the petitioner and not from isolated and occasional transactions. . . .

"With respect to the loss of $68,000 resulting from the petitioner's endorsement of the Bowers Company notes, he testified that in endorsing the notes he was seeking to protect his investment in its stock. Aside from endorsing an undisclosed number of notes of this company there is nothing in the record to indicate that acting as endorser or guarantor constituted a business or trade with the petitioner. So far as the record shows these were the only notes ever endorsed by the petitioner for the Bowers Company or for any other company or person. From the facts in the case we are of the opinion that the loss did not result from the operation of a trade or business regularly carried on by the petitioner but resulted from isolated or occasional transactions. . . .

"With respect to the remaining losses resulting from the sale of the Bowers Company stock in 1921 and 1922, we do not think the petitioner's ownership of stock in a number of corporations which he held as an investment during 1921 and 1922 or the sale of some of such stock in those years constituted a business or trade regularly

carried on by him. As to his being in the investment business, the petitioner testified as follows: 'Q. Would you say you were in the investment business, Mr. Clark?' 'A. No, sir.'

"Since the petitioner was not in the investment business or engaged in the business of a dealer in securities, we think the losses resulting from the sale of the Bowers Company stock in 1921 and 1922 constituted losses arising from occasional or isolated transactions and not from the operation of a business regularly carried on. . . ."

In support of the contrary view the District Court of Appeals said:

"It appears that during the times in question appellant was engaged in regularly carrying on the business of dredging, operated by a corporation of which appellant was principal owner and active directing head, and to which he devoted all of his time and energies. Appellant accordingly was necessarily concerned with the financial conditions and difficulties which beset the business, and he was compelled by circumstances to indorse the company's notes in order to supply it with necessary operating funds. This action was not isolated or occasional but became part of the operation of the business, and helped to carry it on. It is true that appellant did not regularly carry on a business of indorsing notes for profit, but his indorsement of the company's notes was part of the business regularly carried on for the company. It is also true that appellant was not regularly engaged in the business of selling corporate stocks, but the transactions of that character appearing in the record can not be separated from the regular course of business of which they were part, and must not be considered as if wholly independent transactions."

We agree with the Commissioner and the Board of Tax Appeals. The judgment below must be reversed.

The respondent was employed as an officer of the corporation; the business which he conducted for it was not his own. There were other stockholders. And in no sense can the corporation be regarded as his *alter ego,* or agent. He treated it as a separate entity for taxation; made his own personal return and claimed losses through dealings with it. He was not regularly engaged in endorsing notes, or buying and selling corporate securities. The unfortunate endorsements were no part of his ordinary business, but occasional transactions intended to preserve the value of his investment in capital shares.

A corporation and its stockholders are generally to be treated as separate entities. Only under exceptional circumstances—not present here—can the difference be disregarded.

Reversed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* COMMONWEALTH IMPROVEMENT CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 95. Argued November 14, 1932.—Decided December 12, 1932.

1. The Court does not undertake to determine points not raised or considered below. P. 418.
2. The taxpayer, a corporation wholly owned by the estate of a decedent who had set it up and transferred securities to it as a medium for avoiding multiple death duties and insuring the safety of a charitable endowment, was assessed a deficiency in its return for 1920 on account of a gain arising out of an exchange of securities between it and the estate. It contended that there could be no true gain or loss in transactions between it and the estate because they were the same entity. *Held:* The record fails to disclose circumstances sufficient to require disregard of the corporate form. P. 419.

57 F. (2d) 47, reversed.

CERTIORARI, 286 U. S. 541, to review a judgment reversing a decision of the Board of Tax Appeals, 20 B. T. A. 1189, determining a deficiency in income taxes. Cf. the two cases next preceding.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John H. McEvers* were on the brief, for petitioner.

Mr. Schofield Andrews, with whom *Mr. Ellis Ames Ballard* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Respondent—Commonwealth Improvement Company—all of whose shares are owned by the Estate of P. A. B. Widener (he died in 1915), made return concerning income and excess profits taxes for 1920 wherein it claimed deduction for loss occasioned by transfer of British-American Tobacco Company stock to the Estate. The Commissioner refused to allow the deduction and found that rightly regarded the transaction had yielded gain to the taxpayer. A deficiency assessment followed.

The Board of Tax Appeals approved the Commissioner's action; but the Circuit Court of Appeals, Third Circuit, held otherwise. [57 F. (2d) 47.]

Having acquired control of the Commonwealth Improvement Company, incorporated under an old Pennsylvania charter, Mr. Widener caused an increase of its capital stock and authorization of $20,000,000 script and debentures. He then—May 1, 1912—conveyed to the corporation sundry stocks valued at $25,000,000 taking in payment all its shares and $20,000,000 in debentures and script. He was old and the double purpose was to avoid multifold death duties or transfer taxes and to insure the safety of an endowment which he wished to

donate to a favorite charity—School for Crippled Children. $4,000,000 of the debentures so received were promptly deposited in trust for the benefit of that School.

Among the securities transferred by Widener to respondent were 225,000 shares British-American Tobacco Company. Their market value March 1, 1913, was $5,315,625—$23.625 per share.

In 1919 the Improvement Company, under privilege extended to stockholders, subscribed for and received 75,000 new shares then issued by the British-American Company. Paying therefor $326,437.50—$4.3525 per share—much less than market value.

In 1920 the trustees of the Estate acquired the 4,000,000 of respondent's debentures theretofore deposited for benefit of the School. These were transferred to respondent and in part payment it transferred to the Estate the original block (the identical certificates) of 225,000 British-American Tobacco Company shares valued at $5,287,500—$23.50 per share. The apparent result was sale of the whole block at twelve and one-half cents per share under the March 1, 1913, value with consequent net loss of $28,125.00. For this sum respondent claimed deduction upon its 1920 tax return.

When the Commissioner audited the return he decided that the base value per unit (for taxation purposes) of the 225,000 shares British-American Tobacco Company, transferred as shown, should be ascertained by adding to their total market value March 1, 1913—$5,315,625.00—the total paid for the 75,000 shares acquired in 1919, $326,437.50 and dividing the resulting sum by 300,000. The quotient, $18.806,875, he held was the base cost of each transferred share. Accordingly, he found a gain by respondent of $1,055,953.12 and made an appropriate deficiency assessment.

In brief and argument here respondent advances two points. First, it is said the Commissioner improperly

reckoned the base value of the British-American Tobacco Company shares. Second, that under the peculiar facts of the cause the transaction under consideration resulted in no true loss or gain. Respondent was merely the agency or instrumentality of the trustees of the Estate in administering their trust. Practically considered, the Improvement Company and the Estate are the same entity.

The Board of Tax Appeals expressed no opinion concerning the Commissioner's method of reckoning—it was not requested so to do. There the respondent relied entirely upon the second point. The Circuit Court of Appeals ruled only on the same point. In such circumstances, we do not undertake to determine what was not considered below.

Upon the second point we think the Board of Tax Appeals reached the right conclusion; the judgment of the Circuit Court of Appeals must be reversed.

Among other things, the Board well said—

"The petitioner does not now argue before the board that the method of computing the gain was incorrect, but relies entirely upon its contention that the corporation and the estate are the same entity. If this contention were logically applied it would follow that all income received by the corporation since its organization was properly taxable as income of P. A. B. Widener and his estate and should have been added to any other income which Widener and his estate received during these years and taxed at the rates applicable to individuals rather than returned by the petitioner and taxed at the rates fixed for corporations. For the purposes of inheritance and transfer taxes imposed by the various States upon the transfer of the stocks owned by petitioner the corporate entity should have been disregarded upon the death of Widener and these stocks subjected to whatever taxes would have been payable had they been owned by the decedent. But

petitioner does not seek to carry its contention to such a conclusion. Having enjoyed the benefits which resulted from its separate existence, it seeks to perpetuate those benefits and asks that the separate existence and tax liability of the petitioner and its single stockholder be overlooked only with respect to transactions which take place between them. That this is an afterthought is plainly evidenced by the action of petitioner in claiming a deduction upon this same transaction when it believed a deductible loss had been sustained. . . .

"The fact is that petitioner did have a separate legal existence with privileges and obligations entirely separate from those of its stockholders. The fact that it had only one stockholder seems of no legal significance. *Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U. S. 333."

Counsel for respondent concede that ordinarily a corporation and its stockholders are separate entities, whether the shares are divided among many or are owned by one. Consequently, they make no effort to support any general rule under which a corporation and its single stockholder have such identity of interest that transactions between them must be disregarded for tax purposes. They submit, however, the peculiar facts here disclosed suffice to show there was really no income, nothing properly taxable as such. They refer to *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330 and *Gulf Oil Corp.* v. *Lewellyn*, 248 U. S. 71, not as controlling but as instances where the court looked through mere form and regarded substance.

While unusual cases may require disregard of corporate form, we think the record here fails to disclose any circumstances sufficient to support the petitioner's claim. Certainly, the Improvement Company and the Estate were separate and distinct entities; the former was avowedly utilized to bring about a change in ownership beneficial to the latter. For years they were recognized and

treated as different things and taxed accordingly upon separate returns. The situation is not materially different from the not infrequent one where a corporation is controlled by a single stockholder. See *Eisner* v. *Macomber,* 252 U. S. 189, 208, 209; *Lynch* v. *Hornby,* 247 U. S. 339, 341; *United States* v. *Phellis,* 257 U. S. 156, 172, 173.

Southern Pacific Co. v. *Lowe, supra,* and *Gulf Oil Corp.* v. *Lewellyn, supra,* (the latter covered in principle by the first,) cannot be regarded as laying down any general rule authorizing disregard of corporate entity in respect of taxation. These cases presented peculiar situations and were determined upon consideration of them. In the former this court said [p. 338]—"The case turns upon its very peculiar facts, and is distinguishable from others in which the question of the identity of a controlling stockholder with his corporation has been raised. *Pullman Car Co.* v. *Missouri Pacific Ry. Co.,* 115 U. S. 587, 596; *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.,* 205 U. S. 364, 391."

Reversed.

EARLE & STODDART, INC., ET AL. *v.* ELLERMAN'S WILSON LINE, LTD.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 20. Argued November 19, 20, 1932.—Decided December 12, 1932.

1. Rev. Stats., § 4282, exempting the vessel-owner from liability to cargo for loss or damage by fire, "unless such fire is caused by the . . . neglect of such owner," means personal negligence of the owner, or, in case of a corporate owner, negligence of its managing officers or agents. P. 424.
2. The fire resulted inevitably from conditions in a coal bunker, which were chargeable to the negligence of the vessel's chief engineer in storing new coal before sailing, and which rendered her unseaworthy

from the time she left port. Assuming the unseaworthiness could have been discovered by due diligence, *held:*

(1) The breach of the owner's implied warranty of seaworthiness did not constitute "neglect" in the sense of the fire statute. P. 425.

(2) The provisions of the Harter Act, § 3, respecting seaworthiness, have to do with exemption from liabilities other than for losses by fire; and that act did not modify or repeal the fire statute. P. 426.

3. Bills of lading incorporating the fire statute and containing clauses relieving the vessel-owner from liability for losses due to certain causes, if the owner had "exercised due diligence to make the steamer seaworthy,"—*held* not to have added anything to the personal obligations of the vessel-owner so far as loss from fire is concerned, and not to have waived the statutory immunity in that regard. P. 428.

4. Rule that vessel-owner's liability on personal contracts is not limited to value of his interest in vessel and freight, *held* inapplicable where owner's claim is complete immunity from liability, and where alleged personal contracts consisted merely of bills of lading, executed by railroads and by other steamship companies. P. 429.

54 F. (2d) 913, affirmed.

CERTIORARI, 286 U. S. 535, to review the affirmance of a decree dismissing a libel in admiralty. The District Court's opinion is reported, 45 F. (2d) 231.

Mr. T. Catesby Jones, with whom *Messrs. D. Roger Englar* and *James W. Ryan* were on the brief, for petitioners.

The fire exception in the Act of 1851 has no application to damages which result inevitably from failure, (while a vessel is still in the loading port under the control of the owner's general agent,) to use reasonable care to supply, prepare and inspect the vessel for sea so far as protection against outbreak of fire is concerned,—particularly when the unseaworthy condition of the vessel is discoverable by the exercise of ordinary care before sailing by even an unskilled person. *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139; *The Etna Maru,* 33 F. (2d) 232; *Liverpool Navigation Co.* v. *Brooklyn Ter-*

minal, 251 U. S. 48; *The Malcolm Baxter, Jr.,* 277 U. S. 323; *Richardson* v. *Harmon,* 222 U. S. 96; *Pendleton* v. *Benner Line,* 246 U. S. 353; *Capitol S. S. Co.* v. *Cambria Steel Co.,* 249 U. S. 334; *The Caledonia,* 157 U. S. 124; *The Wildcroft,* 201 U. S. 378; *The Edwin I. Morrison,* 153 U. S. 199.

When, as here, the petitioners' loss legally flows from the unseaworthiness—the *Malcolm Baxter, Jr., supra*—the proximate cause of the loss is the unseaworthiness, and not fire. *The G. R. Booth,* 171 U. S. 450.

The duty to make the ship seaworthy is the primary and most important duty of the shipowner in every contract of affreightment. *The Caledonia, supra.*

Failure to see to it that ordinary care is used to make the vessel seaworthy on sailing from the loading port is always negligence of the shipowner himself. Especially is this true when the shipowner himself has warranted that at the time of sailing from the loading port the vessel is in fact seaworthy so far as due diligence can make her so, and that he, himself, had exercised that diligence. Such a breach of warranty legally constitutes personal neglect and privity. *The Soerstad,* 257 Fed. 130; *Royal Exchange* v. *Kingsley Navigation Co.,* (1923) Appeal Cases 235; *Paterson, Zochonis & Co.* v. *Elder Dempster & Co.,* L. R. 1924 Appeal Cases 522; *Chesapeake Lighterage Co.* v. *Baltimore Co.,* 40 F. (2d) 394; *United States* v. *Charbonnier,* 45 F. (2d) 174; *The Poleric,* 25 F. (2d) 843; *Christopher* v. *Grueby,* 40 F. (2d) 8; *Pacific Co.* v. *Peterson,* 278 U. S. 130; *Bethlehem Co.* v. *Gutradt Co.,* 10 F. (2d) 769; *The Annie Faxon,* 75 Fed. 312.

The Circuit Court of Appeals overlooked the legal proposition that the damages here sued for flowed from unseaworthiness.

Neither the exception in the bill of lading of loss "by fire or flood, from any cause or wheresoever occurring,"

nor the insertion of a clause worded as follows, " This shipment is subject to all the terms and provisions of and all exemptions from liability contained in . . . §§ 4281 and 4287, each inclusive, of the United States Statutes," reduces or impairs the personal duty imposed by the warranty in a separate and distinct clause in the bill of lading that the respondent would supply a vessel which on sailing from the loading port would be in fact seaworthy against fire so far as use of ordinary care in the loading port could make her so, and that " the owners " of the vessel would themselves exercise the necessary due diligence to make the vessel seaworthy. The contract does not authorize the delegation of that duty.

This was a personal contract of the respondent shipowner, for the breach of which it was responsible. The respondent, through its New York managing agent, held itself out in New York, the loading port, as a common carrier, under its corporate name, and personally contracted and warranted through such agent that the vessel on sailing would in fact be seaworthy so far as the exercise of ordinary care could make her so. *Pendleton* v. *Benner Line,* 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139; *Richardson* v. *Harmon,* 222 U. S. 96.

It has been settled in this country by a long line of decisions that where, as here, a corporation is doing business elsewhere than at the place where its corporate officers reside or have their office, and has committed or delegated the conduct of its business at that place to an agent, then the knowledge and privity of such agent is that of the corporation personally.

Mr. Cletus Keating, with whom *Messrs. L. De Grove Potter, James H. Herbert,* and *Richard L. Sullivan* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Earle and Stoddart, Incorporated, and other owners of cargo shipped on the steamship *Galileo,* sued her owner and operator, Ellerman's Wilson Line, Limited, in the federal court for southern New York, for breach of contract to deliver at destination. The defendant pleaded in bar the fire statute, which provides: "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner." Rev. Stat. § 4282, Act of March 3, 1851, c. 43, § 1, 9 Stat. 635.

The District Court made these findings: Shortly after the departure from New York coal in a temporary bunker was found to be afire through spontaneous combustion. Following appropriate efforts to extinguish the fire, the vessel sank and practically the entire cargo was lost. The immediate cause of the loss was the fire, to which no design or neglect of the owner contributed. The immediate cause of the fire was the condition of the coal at the time the voyage was commenced, which rendered the vessel unseaworthy. The sole cause of the unseaworthiness was the gross negligence of the ship's chief engineer in putting a new supply of coal on top of old coal then known to be heated. The Circuit Court of Appeals concurred in these findings and affirmed the decree which dismissed the libel. 54 F. (2d) 913. This Court granted certiorari on the ground of conflict of decisions. 286 U. S. 535.

The cargo-owners concede that ordinarily the phrase in the fire statute "neglect of such owner" means personal negligence of the owner, or, in case of a corporate

owner, negligence of its managing officers or agents; and that the negligence of the master, chief engineer or other ship's officers does not deprive the owner of the statutory immunity. *Walker* v. *Transportation Co.*, 3 Wall. 150; *Craig* v. *Continental Insurance Co.*, 141 U. S. 638, 646. The contention is that the statute does not confer immunity where the fire resulted from unseaworthiness existing at the commencement of the voyage and discoverable by the exercise of ordinary care; or, at least, that the statute does not afford immunity where the owners warrant by their bills of lading, as it is asserted they have done here, that they will "exercise due diligence to make the steamer seaworthy."

First. The fire statute, in terms, relieves the owners from liability "unless such fire is caused by the design or neglect of such owner." The statute makes no other exception from the complete immunity granted. The cargo-owners do not make the broad contention that the statute affords no protection to the vessel-owner if the fire was caused by unseaworthiness existing at the commencement of the voyage.[1] Their contention is that it

[1] Such a contention with respect to the English Act was rejected by the House of Lords. *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*, [1931] A. C. 726. See also *Virginia Carolina Chemical Co.* v. *Norfolk & N. A. Steam Shipping Co.*, [1912] 1 K. B. 229; *Ingram & Royle* v. *Services Maritimes du Tréport*, [1914] 1 K. B. 541. Compare *Royal Exchange Assurance* v. *Kingsley Navigation Co.*, [1923] A. C. 235, construing the Canadian Act. The English Act relieves the shipowner from liability for loss from fire where the loss occurred "without his actual fault or privity." Merchants Shipping Act, 1894, § 502; 57 & 58 Vict., c. 60. The original English fire statute of 1786, 26 Geo. III, c. 86, which was the model for the American statute of 1851, contained no exception for the owner's fault or privity; the American enactment was a deliberate departure in that respect. The bill as originally reported contained an exception only for the "design" of the owner, but this was amended to read "design or neglect." See 23 Cong. Globe, 31st Cong., 2d Sess., p. 715.

does not relieve the owner if the unseaworthiness was discoverable by due diligence. The argument is that the duty of the owner to make the ship seaworthy before starting on her voyage is non-delegable and if the unseaworthiness could have been discovered by due diligence there was necessarily neglect of the vessel-owner.

In support of this contention, the cargo-owners place some reliance upon The *Edwin I. Morrison,* 153 U. S. 199, *The Caledonia,* 157 U. S. 124, and *The Carib Prince,* 170 U. S. 655. Those cases enunciate the rule that in every contract of affreightment there is, unless otherwise expressly stipulated, an implied warranty of seaworthiness at the commencement of the voyage. The warranty is absolute that the ship is in fact seaworthy at that time, and the liability does not depend upon the knowledge or ignorance, the care or negligence of the shipowner or charterer. Obviously, those cases lend no support to the contention that breach of the implied warranty of seaworthiness constitutes "neglect" of the vessel-owner under the fire statute.[2]

The cargo-owners rely chiefly upon *International Navigation Co.* v. *Farr & Bailey Mfg. Co.,* 181 U. S. 218, and *The Wildcroft,* 201 U. S. 378. Those cases involved the construction of the Harter Act; and the language there employed is different. The Harter Act provides in § 3 that the vessel-owner shall not be liable if he "shall exercise due diligence to make the said vessel in all respects seaworthy." And under that Act the require-

[2] Compare also *Christopher* v. *Grueby,* 40 F. (2d) 8, 12–13, cited in behalf of the cargo-owners, which deals with the liability of the shipowner to seamen for failure to provide a seaworthy vessel; and *Bethlehem Shipbuilding Corp.* v. *Gutradt Co.,* 10 F. (2d) 769, likewise cited, which deals with the responsibility of the shipowner, apart from statutory exemption, for loss arising from the default of a shipbuilder on a contract to repair.

ment of due diligence is not satisfied if there is negligence on the part of any of the ship's employees. *International Navigation Co.* v. *Farr & Bailey Mfg. Co., supra.* But the Act does not purport to create any general duty on the part of shipowners. Its requirement of due diligence is imposed as a condition of securing immunity from liability for certain kinds of losses, like those due to errors in navigation or management. That the provisions of the Harter Act do not refer to liability for losses arising from fire is made clear by § 6 which declares that the Act "shall not be held to modify or repeal §§ 4281, 4282, and 4283 of the Revised Statutes,"—§ 4282 being the fire statute. The courts have been careful not to thwart the purpose of the fire statute by interpreting as "neglect" of the owners the breach of what in other connections is held to be a non-delegable duty.[3] Nothing

[3] In all the cases where immunity from liability for damage by fire was held to be lost because of neglect of the owners, the courts have based their finding of neglect on the action of the owners or managing agents, or upon their failure to see that action was taken where it was their duty to act. *The Elizabeth Dantzler,* 263 Fed. 596; *Hines* v. *Butler,* 278 Fed. 877; *Williams S. S. Co.* v. *Wilbur,* 9 F. (2d) 622; *Arkell & Douglas* v. *United States,* 13 F. (2d) 555; *Bank Line* v. *Porter,* 25 F. (2d) 843; *Petition of Sinclair Navigation Co.,* 27 F. (2d) 606; *United States* v. *Charbonnier,* 45 F. (2d) 174; *The Older,* 1 F. Supp. 119. In *The Etna Maru,* 20 F. (2d) 143, the District Court was of opinion that the fire statute did not confer immunity where the loss was due to unseaworthiness existing at the beginning of the voyage. As an alternative ground of decision, however, the court held that the vessel-owner had not overcome a presumption of personal neglect, arising from the fact of unseaworthiness. On appeal the case was affirmed, 33 F. (2d) 232, but apparently on the ground that the fire statute, like the statutes limiting the extent of liability, leaves the owner liable, in any event, up to the value of the ship. But compare *The Rapid Transit,* 52 Fed. 320, 321. Insofar as the decision rests on the ground advanced by the cargo-owners here, it cannot be approved.

contained in the opinion of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, is to be taken as indicating a different view.

Second. No provision in any bill of lading deprives the vessel-owner of the protection given by the fire statute. There are 238 bills of lading on 18 different forms. In no bill of lading is there an express warranty of seaworthiness. In each, there is a provision expressly incorporating the fire statute. Many of the bills of lading contain also this provision: "It is mutually agreed that . . . the carrier shall not be liable, as carrier or otherwise, for any loss, damage, delay or default, whether occurring during transit or before, . . . occasioned by fire or flood, from any cause or wheresoever occurring; . . . by explosion, bursting of boilers, breakage of shafts, of any latent defect in hull, machinery, or appurtenances, or unseaworthiness of the steamer, whether existing at the time of shipment, or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy; . . ." So far as loss from fire is concerned, the quoted provision leaves the area of personal neglect unchanged, adding nothing to the obligations of the vessel-owner. And in view of the express incorporation of the fire statute in the bill of lading, the provision is not to be construed as a waiver of the statutory immunity for loss by fire.[4]

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[4] Compare *The Strathdon*, 101 Fed. 600, 602; *The Hoffmans*, 171 Fed. 455, 462–463; *The Yungay*, 58 F. (2d) 352, 357; *D'Utassy* v. *Mallory Steamship Co.*, 162 App. Div. 410, 412–414; 147 N. Y. S. 313, affirmed *per curiam* 223 N. Y. 592; 119 N. E. 1040; *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*, [1931] A. C. 726; *Ingram & Royle* v. *Services Maritimes du Tréport*, [1914] 1 K. B. 541. With these cases compare *The Poleric*, 17 F. (2d) 513, 514–516, affirmed *sub nom. Bank Line* v. *Porter*, 25 F. (2d) 843; *Virginia Carolina Chemical Co.* v. *Norfolk & N. A. Steam Shipping Co.*, [1912] 1 K. B. 229.

Third. There was no personal contract of the vessel-owner superseding the fire statute. The cargo-owners invoke the rule announced in *Pendleton* v. *Benner Line,* 246 U. S. 353, and *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139. Those cases have no application here. They declare that the statutes limiting the amount of liability of a shipowner to the amount or value of his interest in the vessel and her freight then pending (Act of March 3, 1851, c. 43, § 3, Rev. Stat. § 4283; Act of June 26, 1884, c. 121, § 18, 23 Stat. 53, 57) do not apply to personal contracts of the owner.[5] Here the inquiry is not whether there was a "personal contract," on which the shipowner can be held to the full amount of the loss, but whether he can be held liable at all. He cannot be held liable unless by agreement, or otherwise, he has waived the benefit of the fire statute. The only basis for the claim of waiver is the bill of lading. What has already been said concerning their provisions disposes of that inquiry.

Moreover, the rule announced in the *Pendleton* and *Luckenbach* cases has been applied by this Court only to private charter parties executed by the owner. The bills of lading, which are said to contain "personal contracts," were not executed by the respondent or by any of its officers or managers. They were given, in large part, by agents of railroads or other steamship companies and are to be regarded merely as ship's documents. Compare *Capitol Transportation Co.* v. *Cambria Steel Co.,* 249 U. S. 334, 336.

The District Court was right in dismissing the libel, and the decree of the Circuit Court of Appeals is accordingly

Affirmed.

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[5] See, also, *Richardson* v. *Harmon,* 222 U. S. 96, 106. Compare *In re Pennsylvania R. Co.,* 48 F. (2d) 559, 566; *The No. 34,* 25 F. (2d) 602, 607; *The Soerstad,* 257 Fed. 130.

GENERAL ELECTRIC CO. ET AL. *v.* MARVEL RARE METALS CO. ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 57. Argued November 17, 1932.—Decided December 12, 1932.

1. In a suit in the district court for infringement of patents, an order granting a motion to dismiss, for want of jurisdiction, a counterclaim alleging infringement by plaintiffs of a patent of the defendants and praying for an injunction and an accounting, *held* an interlocutory order refusing an injunction, and appealable to the Circuit Court of Appeals under Judicial Code, § 129; U. S. C. Tit. 28, § 227. P. 432.
2. Section 48 of the Judicial Code (U. S. C., Tit. 28, § 227) relates to venue, and the privilege conferred by it upon defendants in patent cases, in respect of the places in which suits may be maintained against them, may be waived. P. 434.
3. In a suit in the district court for infringement of patents, a counterclaim alleging infringement by plaintiffs of a patent of the defendants and praying for an injunction and accounting, may be maintained against the plaintiffs (Equity Rule 30), though it does not contain allegations showing that plaintiffs are inhabitants of, or committed acts of infringement and have a regular place of business within, the district in which they commenced their suit. Section 48 of the Judicial Code (U. S. C., Tit. 28, § 227) does not prevent. P. 435.

56 F. (2d) 823, affirmed.

CERTIORARI, 286 U. S. 541, to review a judgment which, upon appeal from an order dismissing a counterclaim in a suit brought by the petitioners for patent infringement, denied a motion to dismiss the appeal and reversed the order.

Mr. Lawrence Bristol, with whom *Mr. Charles Neave* was on the brief, for petitioners.

Mr. William C. McCoy, with whom *Mr. Lloyd L. Evans* was on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioners, New York corporations having their principal offices in that State, brought this suit in the northern district of Ohio against defendants, two corporations having regular and established places of business in that district and two individuals residing there. The complaint alleges that the defendants infringed plaintiffs' rights under certain patents relating to the manufacture of hard-metal products by making, using and selling tools and parts thereof embodying such inventions. The answer avers that the patents are invalid and denies infringement, alleging that all manufacture by defendants has been under one or more of five patents granted defendant Gebauer. And the answer sets up a counterclaim against plaintiffs for the infringement of one of these patents and prays injunction against such infringement and an accounting. But it does not allege that plaintiffs are inhabitants of the district, or that they infringed defendants' patent and have a regular and established place of business there. The plaintiffs moved to dismiss the counterclaim for want of jurisdiction. The district court granted their motion. Defendants appealed. Plaintiffs moved to dismiss the appeal on the ground that the dismissal of the counterclaim does not amount to the refusal of an injunction under § 129, Judicial Code, and was not appealable under that section. The Circuit Court of Appeals denied the motion and reversed the order appealed from. 56 F. (2d) 823.

Plaintiffs insist that the court erred in refusing to dismiss the appeal. Equity Rule 30 declares: "The defendant by his answer shall set out . . . his defense to each claim asserted in the bill . . . The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and

may, without cross bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross claims." 268 U. S. 709. It is clear that in this suit the court in a single decree may finally determine the merits of the cause of action alleged in the complaint and the counterclaim set up in the answer. The order dismissing the counterclaim is interlocutory. *Winters* v. *Ethell,* 132 U. S. 207, 210. *Ex parte Railroad Co.,* 95 U. S. 221, 225. *Ayres* v. *Carver,* 17 How. 591, 595. The general rule is that review of interlocutory orders must await appeal from the final decree. But in proceedings for injunctions and receivers exceptions have been made by § 129, Judicial Code:

"Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals. . . . The appeal . . . must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof. . . ." 28 U. S. C., § 227.

The reasons suggested by plaintiffs in support of the contention that the order is not appealable are that there was no hearing upon any application for an injunction and that the dismissal of the counterclaim was not the refusal of an injunction. But by their motion to dismiss, plaintiffs themselves brought on for hearing the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction. That is, whether the allegations of the answer are sufficient to constitute a cause of action for injunction. And the court necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction. It cannot be said, indeed plaintiffs do not claim, that the dismissal did not deny to defendants the protection of the injunction prayed in their answer. The ruling of the Circuit Court of Appeals that an injunction has been denied by an interlocutory order which is reviewable under § 129 is sustained by reason and supported by the weight of judicial opinion. *Emery* v. *Central Trust & Safe Deposit Co.*, 204 Fed. 965, 968. *Ward Baking Co.* v. *Weber Bros.*, 230 Fed. 142. *Historical Pub. Co.* v. *Jones Bros. Pub. Co.*, 231 Fed. 638, 643. *Naivette* v. *Philad Co.*, 54 F. (2d) 623. Cf. *Banco Mercantil* v. *Taggart Coal Co.*, 276 Fed. 388, 390.* Plaintiffs' motion to dismiss the appeal was rightly denied.

Plaintiffs maintain that the Circuit Court of Appeals erred in sustaining the counterclaim.

They call attention to Equity Rule 30 and cite § 48 of the Judicial Code: "In suits brought for the infringement of letters patent the district courts . . . shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which

* Contra: *Radio Corp.* v. *J. H. Bunnell & Co.*, 298 Fed. 62. *Allied Metal Stamping Co.* v. *Standard Electric Equipment Corp.*, 55 F. (2d) 221.

the defendant . . . shall have committed acts of infringement and have a regular and established place of business. . . ." 28 U. S. C., § 109. They argue that a counterclaim for patent infringement cannot be maintained over plaintiffs' objection if it does not contain allegations showing that plaintiffs are inhabitants of or committed acts of infringement and have a regular place of business within the district in which they commenced their suit. And they insist that to construe the rule more broadly would make it repugnant to the statute.

Rule 30 is without force as against conflicting statutory provisions. *Washington-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629. It deals with counterclaims of two classes. The first includes every counterclaim arising out of the transaction which is the subject matter of the suit and which must be set up in the answer. The second class includes counterclaims not so arising but which might be the subject of an independent suit in equity and which may but need not be so set up. *American Mills Co.* v. *American Surety Co.*, 260 U. S. 360, 364. We may assume that the counterclaim in question does not arise out of the subject matter of plaintiffs' suit. But, unless § 48 prevents, it may be set up in the answer. *Marconi Wireless Telegraph Co.* v. *National E. S. Co.*, 206 Fed. 295. *Electric Boat Co.* v. *Lake Torpedo Boat Co.*, 215 Fed. 377. *United States Expansion Bolt Co.* v. *Kroncke Co.*, 216 Fed. 186; 234 Fed. 868. *Buffalo Specialty Co.* v. *Vancleef*, 217 Fed. 91. *Champion Spark Plug Co.* v. *Champion Ignition Co.*, 247 Fed. 200. *Victor Talking Mach. Co.* v. *Brunswick-Balke-Collender Co.*, 279 Fed. 758.

Section 24 (7) of the Judicial Code is the source from which district courts derive jurisdiction of cases arising under the patent laws. Under that clause and until the enactment of § 48 a suit for infringement might have been maintained in any district in which jurisdiction of defendant could be obtained. *In re Hohorst*, 150 U. S. 653,

661. And see *In re Keasbey & Mattison Co.*, 160 U. S. 221–230. Section 48 relates to venue. It confers upon defendants in patent cases a privilege in respect of the places in which suits may be maintained against them. And that privilege may be waived. *Lee* v. *Chesapeake & Ohio Ry. Co.*, 260 U. S. 653. *Gulf Smokeless Coal Co.* v. *Sutton, Steele & Steele*, 35 F. (2d) 433, 438. The section does not, as to counterclaims, purport to modify the rule, prevailing prior to its enactment. The setting up of a counterclaim against one already in a court of his own choosing is very different, in respect to venue, from hailing him into that court. Section 48, taken according to the meaning ordinarily given to the words used, applies only to the latter, and we find no warrant for a construction that would make it include the former. This Court has recently declared that one who sues in a federal court of equity to enjoin the infringement of his patent, thereby submits himself to the jurisdiction of the court with respect to all the issues of the case, including those pertaining to a counterclaim praying that he be restrained from infringing a patent of the defendant. *Leman* v. *Krentler-Arnold Co.*, 284 U. S. 448, 451. And that rule applies here.

Affirmed.

SORRELLS v. UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 177. Argued November 8, 1932.—Decided December 19, 1932.

1. Where application of a penal statute according to its literal meaning would produce results contrary to the plain purpose and policy of the enactment, and flagrantly unjust, another construction should be adopted if possible. P. 446.
2. The National Prohibition Act, though denouncing generally as criminal the sale of intoxicating liquor for beverage purposes, was

not intended to apply where the sale is instigated by a prohibition agent for the purpose of luring a person, otherwise innocent, to the commission of the crime so that he may be arrested and punished. P. 448.

3. The defense of entrapment can not be attributed to any power in the courts to grant immunity or defeat prosecution when a penal statute has been violated; it depends upon the scope of the statute alleged to have been violated, *i. e.*, whether the statute should be construed as intending to apply in the particular case. P. 449.
4. That the issue of entrapment will involve collateral inquiries as to the activities of government agents and as to the conduct and purposes of the defendant previous to the alleged offense, is not a valid reason for rejecting entrapment as a defense. P. 451.
5. Entrapment is available as a defense under a plea of not guilty; it need not be set up by a special plea in bar. P. 452.
6. Evidence of entrapment in this case *held* such that it should have been submitted to the jury. P. 452.

57 F. (2d) 973; reversed.

CERTIORARI * to review the affirmance of a sentence for violation of the Prohibition Act. The certiorari was limited to the question whether evidence on the issue of entrapment was sufficient to go to the jury.

Mr. John Y. Jordan, Jr., with whom *Mr. A. Hall Johnston* was on the brief, for petitioner.

The court should have directed a verdict in favor of the defendant upon the resting by the Government of its case because the evidence showed entrapment. *Peterson* v. *United States*, 255 Fed. 433; *Butts* v. *United States*, 273 Fed. 35; *Newman* v. *United States*, 299 Fed. 126; *Silk* v. *United States*, 16 F. (2d) 568; see also 18 A. L. R. 143, 149, 164, and *Casey* v. *United States*, 276 U. S. 413.

If the evidence on the question of entrapment is in conflict, it presents an issue of fact which the court should have submitted to the jury on proper instructions. *Jarl* v. *United States*, 19 F. (2d) 891, and cases *supra*.

* See Table of Cases Reported in this volume.

Solicitor General Thacher, with whom *Messrs. Whitney North Seymour* and *John J. Byrne* were on the brief, for the United States.

Since the defendant has intentionally committed all the acts constituting the crime charged against him, there is logical force in the view of the court below that the courts may not absolve him from guilt because an officer of the Government instigated the crime. We submit this view upon the opinion of the court below.

This position, however, is not supported by decisions in other federal courts, which hold that the "defense" of entrapment is maintainable if the crime was induced by Government agents under circumstances which open the Government's action to condemnation upon grounds of public policy. We believe that there undoubtedly are cases where conduct on the part of Government officers is so plainly the provocation for violation of law that public policy requires that the courts should not permit a prosecution for such violation to continue. However, such conduct does not give rise to a defense, but rather calls into operation the courts' power to prevent official abuses.

Where the defendant's act has not been deprived of its criminality by conduct of the officer, the issue of entrapment can not properly be raised under a plea of not guilty, for inquiry regarding the actions of Government officials leads to examination of collateral and sometimes extremely prejudicial matters (such as suspicions of defendant's past criminality, his reputation in the community, and evidence of other crimes) and prevents orderly inquiry by the same jury as to the defendant's guilt or innocence of the act charged. We submit, therefore, that the issue should be raised in advance of trial of the general issue, by a special plea in bar, since the defendant does not contend that he is not guilty, but

that, for reasons of public policy, he should not be prosecuted. The procedure we suggest is supported by the rules of pleading in analogous situations, and will prevent the intrusion of confusion and prejudice. If, as we contend, the issue of entrapment could be raised only by a special plea in bar, the District Court did not err in declining to submit the question to the jury.

If it be said that, although the defense of entrapment is not open to the defendant upon a plea of not guilty, the court may nevertheless, on its own motion and at any stage of the proceedings, decline to proceed with the case for reasons of public policy, then we submit that the question whether the officer's conduct was proper must be decided by the judge, and not by the jury, whether it be one of fact or of law. In this view of the matter the decision below should be affirmed, on the ground that the District Judge concluded that the evidence did not sustain the defense; or, if it be thought that the Judge did not determine the questions of fact, the case should be remanded to the District Court for adjudication by the court of the issue whether defendant was entrapped.

Mr. Chief Justice Hughes delivered the opinion of the Court.

Defendant was indicted on two counts (1) for possessing and (2) for selling, on July 13, 1930, one-half gallon of whiskey in violation of the National Prohibition Act. He pleaded not guilty. Upon the trial he relied upon the defense of entrapment. The court refused to sustain the defense, denying a motion to direct a verdict in favor of defendant and also refusing to submit the issue of entrapment to the jury. The court ruled that "as a matter of law" there was no entrapment. Verdict of guilty followed, motions in arrest, and to set aside the verdict as contrary to the law and the evidence, were denied, and defendant was sentenced to imprisonment for eighteen

months. The Circuit Court of Appeals affirmed the judgment, 57 F. (2d) 973, and this Court granted a writ of certiorari limited to the question whether the evidence was sufficient to go to the jury upon the issue of entrapment.

The Government, while supporting the conclusion of the court below, also urges that the defense, if available, should have been pleaded in bar to further proceedings under the indictment and could not be raised under the plea of not guilty. This question of pleading appropriately awaits the consideration of the nature and grounds of the defense.

The substance of the testimony at the trial as to entrapment was as follows: For the Government, one Martin, a prohibition agent, testified that having resided for a time in Haywood County, North Carolina, where he posed as a tourist, he visited defendant's home near Canton, on Sunday, July 13, 1930, accompanied by three residents of the county who knew the defendant well. He was introduced as a resident of Charlotte who was stopping for a time at Clyde. The witness ascertained that defendant was a veteran of the World War and a former member of the 30th Division A. E. F. Witness informed defendant that he was also an ex-service man and a former member of the same Division, which was true. Witness asked defendant if he could get the witness some liquor and defendant stated that he did not have any. Later, there was a second request without result. One of those present, one Jones, was also an ex-service man and a former member of the 30th Division, and the conversation turned to the war experiences of the three. After this, witness asked defendant for a third time to get him some liquor, whereupon defendant left his home and after a few minutes came back with a half gallon of liquor for which the witness paid defendant five dollars. Martin also testified that he was " the first and only person among those pres-

ent at the time who said anything about securing some liquor," and that his purpose was to prosecute the defendant for procuring and selling it. The Government rested its case on Martin's testimony.

Defendant called as witnesses the three persons who had accompanied the prohibition agent. In substance, they corroborated the latter's story but with some additions. Jones, a railroad employee, testified that he had introduced the agent to the defendant "as a furniture dealer of Charlotte," because the agent had so represented himself; that witness told defendant that the agent was "an old 30th Division man" and the agent thereupon said to defendant that he "would like to get a half gallon of whiskey to take back to Charlotte to a friend of his that was in the furniture business with him," and that defendant replied that he "did not fool with whiskey"; that the agent and his companions were at defendant's home "for probably an hour or an hour and a half and that during such time the agent asked the defendant three or four or probably five times to get him, the agent, some liquor." Defendant said "he would go and see if he could get a half gallon of liquor" and he returned with it after an absence of "between twenty and thirty minutes." Jones added that at that time he had never heard of defendant being in the liquor business, that he and the defendant were "two old buddies," and that he believed "one former war buddy would get liquor for another."

Another witness, the timekeeper and assistant paymaster of the Champion Fibre Company at Canton, testified that defendant was an employee of that company and had been "on his job continuously without missing a pay day since March, 1924." Witness identified the time sheet showing this employment. This witness and three others who were neighbors of the defendant and had known him for many years testified to his good character.

To rebut this testimony, the Government called three witnesses who testified that the defendant had the general reputation of a rum-runner. There was no evidence that the defendant had ever possessed or sold any intoxicating liquor prior to the transaction in question.

It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War. Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation, but the question whether it precludes prosecution or affords a ground of defense, and, if so, upon what theory, has given rise to conflicting opinions.

It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. *Grimm* v. *United States,* 156 U. S. 604, 610; *Goode* v. *United States,* 159 U. S. 663, 669; *Rosen* v. *United States,* 161 U. S. 29, 42; *Andrews* v. *United States,* 162 U. S. 420, 423; *Price* v. *United States,* 165 U. S. 311, 315; *Bates* v. *United States,* 10 Fed. 92, 94, note, p. 97. *United States* v. *Reisenweber,* 288 Fed. 520, 526; *Aultman* v. *United States,* 289 Fed. 251.[1] The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to

[1] See, also, *Regina* v. *Williams,* 1 Car. & K. 195; *People* v. *Mills,* 178 N Y. 274; 70 N. E. 786; *People* v. *Ficke,* 343 Ill. 367; 175 N. E. 543.

reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

The Circuit Court of Appeals reached the conclusion that the defense of entrapment can be maintained only where, as a result of inducement, the accused is placed in the attitude of having committed a crime which he did not intend to commit, or where, by reason of the consent implied in the inducement, no crime has in fact been committed. 57 F. (2d) p. 974. As illustrating the first class, reference is made to the case of a sale of liquor to an Indian who was disguised so as to mislead the accused as to his identity. *United States* v. *Healy,* 202 Fed. 349; *Voves* v. *United States,* 249 Fed. 191. In the second class are found cases such as those of larceny or rape where want of consent is an element of the crime. *Regina* v. *Fletcher,* 8 Cox C. C. 131; *Rex* v. *McDaniel,* Fost. 121, 127, 128; *Connor* v. *People,* 18 Colo. 373; 33 Pac. 159; *Williams* v. *Georgia,* 55 Ga. 391; *United States* v. *Whittier,* 5 Dill. 35; *State* v. *Adams,* 115 N. C. 775; 20 S. E. 722. There may also be physical conditions which are essential to the offense and which do not exist in the case of a trap, as, for example, in the case of a prosecution for burglary where it appears that by reason of the trap there is no breaking.[2] *Rex* v. *Egginton,* 2 Leach C. C. 913; *Regina* v. *Johnson,* Car. & Mar. 218; *Saunders* v. *People,* 38 Mich 218; *People* v. *McCord,* 76 Mich. 200; 42 N. W. 1106; *Allen* v. *State,* 40 Ala. 334; *Love* v. *People,* 160 Ill.

[2] See note of Francis Wharton to *Bates* v. *United States,* 10 Fed. 97–99.

501; 43 N. E. 710. But these decisions applying accepted principles to particular offenses, do not reach, much less determine, the present question. Neither in reasoning nor in effect do they prescribe limits for the doctrine of entrapment.

While this Court has not spoken on the precise question (see *Casey* v. *United States*, 276 U. S. 413, 419, 423 [3]), the weight of authority in the lower federal courts is decidedly in favor of the view that in such case as the one before us the defense of entrapment is available. The Government concedes that its contention, in supporting the ruling of the Circuit Court of Appeals, is opposed by decisions in all the other Circuits except the Tenth Circuit, and no decision in that Circuit suggesting a different view has been brought to our attention. See *Capuano* v. *United States* (C. C. A. 1st), 9 F. (2d) 41, 42; *United States* v. *Lynch* (S. D. N. Y., Hough, J.), 256 Fed. 983, 984; *Lucadamo* v. *United States* (C. C. A. 2d), 280 Fed. 653, 657, 658; *Zucker* v. *United States* (C. C. A. 3d), 288 Fed. 12, 15; *Gargano* v. *United States* (C. C. A. 5th), 24 F. (2d) 625, 626; *Cermak* v. *United States* (C. C. A. 6th), 4 F. (2d) 99; *O'Brien* v. *United States* (C. C. A. 7th), 51 F. (2d) 674, 679, 680; *Butts* v. *United States* (C. C. A. 8th), 273 Fed. 35, 38; *Woo Wai* v. *United States* (C. C. A. 9th), 223 Fed. 412. And the Circuit Court of Appeals of the Fourth Circuit, in the instant case, was able to reach its conclusion only by declining to follow the rule which it had laid down in its earlier decision in *Newman* v. *United States*, 299 Fed. 128, 131.[4] It

[3] Compare *Olmstead* v. *United States*, 277 U. S. 438.

[4] See, also, *United States* v. *Adams*, 59 Fed. 674; *Sam Yick* v. *United States*, 240 Fed. 60, 65; *United States* v. *Echols*, 253 Fed. 862; *Peterson* v. *United States*, 255 Fed. 433; *Billingsley* v. *United States*, 274 Fed. 86, 89; *Luterman* v. *United States*, 281 Fed. 374, 377; *United States* v. *Pappagoda*, 288 Fed. 214; *Ritter* v. *United States*, 293 Fed. 187; *Di Salvo* v. *United States*, 2 F. (2d) 222; *Silk* v.

should be added that in many cases in which the evidence has been found insufficient to support the defense of entrapment the availability of that defense, on a showing of such facts as are present here, has been recognized.[5] The federal courts have generally approved the statement of Circuit Judge Sanborn in the leading case of *Butts* v. *United States, supra,* as follows: "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to com-

United States, 16 F. (2d) 568; *Jarl* v. *United States,* 19 F. (2d) 891; *Corcoran* v. *United States,* 19 F. (2d) 901; *United States* v. *Washington,* 20 F. (2d) 160; *Cline* v. *United States,* 20 F. (2d) 494; *United States ex rel. Hassel* v. *Mathues,* 22 F. (2d) 979; *Driskill* v. *United States,* 24 F. (2d) 525; *Ybor* v. *United States,* 31 F. (2d) 42; *Robinson* v. *United States,* 32 F. (2d) 505; *Vaccaro* v. *Collier,* 38 F. (2d) 862; *Patton* v. *United States,* 42 F. (2d) 68; and cases collected in note in *O'Brien* v. *United States,* 51 F. (2d) 674, 678, including decisions of state courts. Compare *Rex* v. *Titley,* 14 Cox C. C. 502; *Blaikie* v. *Linton,* 18 Scottish Law Rep. 583; London Law Times, July 30, 1881, p. 223; *People* v. *Mills,* 178 N. Y. 274; 70 N. E. 786; *State* v. *Smith,* 152 N. C. 798; 67 S. E. 508; *Bauer* v. *Commonwealth,* 135 Va. 463; 115 S. E. 514; *State* v. *Gibbs,* 109 Minn. 247; 123 N. W. 810; *State* v. *Rippey,* 127 S. C. 550; 122 S. E. 397. See, also, 18 A. L. R. Ann. 146; 28 Col. L. Rev. 1067; 44 Harv. L. Rev. 109; 2 So. Cal. L. Rev. 283; 41 Yale L. J. 1249; 10 Va. L. Rev. 316; 9 Tex. L. Rev. 276.

[5] See cases cited in note 4.

mit it." The judgment in that case was reversed because of the 'fatal error' of the trial court in refusing to instruct the jury to that effect. In *Newman* v. *United States, supra,* the applicable principle was thus stated by Circuit Judge Woods: "It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor." These quotations sufficiently indicate the grounds of the decisions above cited.

The validity of the principle as thus stated and applied is challenged both upon theoretical and practical grounds. The argument, from the standpoint of principle, is that the court is called upon to try the accused for a particular offense which is defined by statute and that, if the evidence shows that this offense has knowingly been committed, it matters not that its commission was induced by officers of the Government in the manner and circumstances assumed. It is said that where one intentionally does an act in circumstances known to him, and the particular conduct is forbidden by the law in those circumstances, he intentionally breaks the law in the only sense in which the law considers intent. *Ellis* v. *United States,* 206 U. S. 246, 257. Moreover, that as the statute is designed to redress a public wrong, and not a private injury, there is no ground for holding the Government estopped by the conduct of its officers from prosecuting the offender. To the suggestion of public policy the objectors answer that the legislature, acting within its constitutional au-

thority, is the arbiter of public policy [6] and that, where conduct is expressly forbidden and penalized by a valid statute, the courts are not at liberty to disregard the law and to bar a prosecution for its violation because they are of the opinion that the crime has been instigated by government officials.

It is manifest that these arguments rest entirely upon the letter of the statute. They take no account of the fact that its application in the circumstances under consideration is foreign to its purpose; that such an application is so shocking to the sense of justice that it has been urged that it is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts. *Casey* v. *United States, supra.* But can an application of the statute having such an effect—creating a situation so contrary to the purpose of the law and so inconsistent with its proper enforcement as to invoke such a challenge—fairly be deemed to be within its intendment?

Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned. In *United States* v. *Palmer,* 3 Wheat. 610, 631, Chief Justice Marshall, in construing the Act of Congress of April 30, 1790, § 8 (1 Stat. 113) relating to robbery on the high seas, found that the words "any person or persons" were "broad enough to comprehend every human being," but he concluded that "general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." In *United States* v. *Kirby,* 7 Wall. 482, the case arose under the Act of Congress of March 3, 1825

[6] See *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 565; *Green* v. *Frazier,* 253 U. S. 233, 240.

(4 Stat. 104) providing for the conviction of any person who "shall knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier . . . carrying the same." Considering the purpose of the statute, the Court held that it had no application to the obstruction or retarding of the passage of the mail or of its carrier by reason of the arrest of the carrier upon a warrant issued by a state court. The Court said: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." And the Court supported this conclusion by reference to the classical illustrations found in Puffendorf and Plowden. *Id.*, pp. 486, 487.

Applying this principle in *Lau Ow Bew* v. *United States*, 144 U. S. 47, the Court decided that a statute requiring the permission of the Chinese government, and identification by certificate, of "every Chinese person other than a laborer," entitled by treaty or the act of Congress to come within the United States, did not apply to Chinese merchants already domiciled in the United States, who had left the country for temporary purposes, *animo revertendi*, and sought to reënter it on their return to their business and their homes. And in *United States* v. *Katz*, 271 U. S. 354, 362, construing § 10 of the National Prohibition Act so as to avoid an unreasonable application of its words, if taken literally, the Court again declared that "general terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead to extreme or absurd results, and where the legislative pur-

pose gathered from the whole Act would be satisfied by a more limited interpretation." [7] See, to the same effect, *Heydenfeldt* v. *Daney Gold Mining Co.*, 93 U. S. 634, 638; *Carlisle* v. *United States*, 16 Wall. 147, 153; *Oates* v. *National Bank*, 100 U. S. 239; *Chew Heong* v. *United States*, 112 U. S. 536, 555; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459–462; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212–214; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 39; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402; *Baender* v. *Barnett*, 255 U. S. 224, 226; *United States* v. *Chemical Foundation*, 272 U. S. 1, 18.

We think that this established principle of construction is applicable here. We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute. This, we think, has been the underlying and controlling thought in the suggestions in judicial opinions that the Government in such a case is estopped to prosecute or that the courts should bar the prosecution. If the requirements of the highest public policy in the maintenance of the integrity

[7] In *Hawaii* v. *Mankichi*, 190 U. S. 197, 214, the Court referred with approval to the following language of the Master of the Rolls (afterwards Lord Esher) in *Plumstead Board of Works* v. *Spackman*, L. R. 13 Q. B. D. 878, 887: "If there are no means of avoiding such an interpretation of the statute," (as will amount to a great hardship,) "a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended."

of administration would preclude the enforcement of the statute in such circumstances as are present here, the same considerations justify the conclusion that the case lies outside the purview of the Act and that its general words should not be construed to demand a proceeding at once inconsistent with that policy and abhorrent to the sense of justice. This view does not derogate from the authority of the court to deal appropriately with abuses of its process and it obviates the objection to the exercise by the court of a dispensing power in forbidding the prosecution of one who is charged with conduct assumed to fall within the statute.

We are unable to approve the view that the court, although treating the statute as applicable despite the entrapment, and the defendant as guilty, has authority to grant immunity, or to adopt a procedure to that end. It is the function of the court to construe the statute, not to defeat it as construed. Clemency is the function of the Executive. *Ex parte United States,* 242 U. S. 27, 42. In that case, this Court decisively denied such authority to free guilty defendants, in holding that the court had no power to suspend sentences indefinitely. The Court, speaking by Chief Justice White, said—"if it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced." And while recognizing the hu-

mane considerations which had led judges to adopt the practice of suspending sentences indefinitely in certain cases, the Court found no ground for approving the practice "since its exercise in the very nature of things amounts to a refusal by the judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution." *Id.* pp. 51, 52. Where defendant has been duly indicted for an offense found to be within the statute, and the proper authorities seek to proceed with the prosecution, the court cannot refuse to try the case in the constitutional method because it desires to let the defendant go free.

Suggested analogies from procedure in civil cases are not helpful. When courts of law refuse to sustain alleged causes of action which grow out of illegal schemes, the applicable law itself denies the right to recover. Where courts of equity refuse equitable relief because complainants come with unclean hands, they are administering the principles of equitable jurisprudence governing equitable rights. But in a criminal prosecution, the statute defining the offense is necessarily the law of the case.

To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts. Judicial nullification of statutes, admittedly valid and applicable, has, happily, no place in our system. The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes. We conceive it to be our duty to construe the statute here in question reasonably, and we hold that it is beyond our prerogative to give the statute an unreasonable construction, confessedly contrary to public policy, and then to decline to enforce it.

The conclusion we have reached upon these grounds carries its own limitation. We are dealing with a statu-

tory prohibition and we are simply concerned to ascertain whether in the light of a plain public policy and of the proper administration of justice, conduct induced as stated should be deemed to be within that prohibition. We have no occasion to consider hypothetical cases of crimes so heinous or revolting that the applicable law would admit of no exceptions. No such situation is presented here. The question in each case must be determined by the scope of the law considered in the light of what may fairly be deemed to be its object.

Objections to the defense of entrapment are also urged upon practical grounds. But considerations of mere convenience must yield to the essential demands of justice. The argument is pressed that if the defense is available it will lead to the introduction of issues of a collateral character relating to the activities of the officials of the Government and to the conduct and purposes of the defendant previous to the alleged offense. For the defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises. *Grimm* v. *United States, supra.* The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it. The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in con-

sequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense.

What has been said indicates the answer to the contention of the Government that the defense of entrapment must be pleaded in bar to further proceedings under the indictment and cannot be raised under the plea of not guilty. This contention presupposes that the defense is available to the accused and relates only to the manner in which it shall be presented. The Government considers the defense as analogous to a plea of pardon or of *autrefois convict* or *autrefois acquit*. It is assumed that the accused is not denying his guilt but is setting up special facts in bar upon which he relies regardless of his guilt or innocence of the crime charged. This, as we have seen, is a misconception. The defense is available, not in the view that the accused though guilty may go free, but that the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct. The federal courts in sustaining the defense in such circumstances have proceeded in the view that the defendant is not guilty. The practice of requiring a plea in bar has not obtained. Fundamentally, the question is whether the defense, if the facts bear it out, takes the case out of the purview of the statute because it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose.

We are of the opinion that upon the evidence produced in the instant case the defense of entrapment was available and that the trial court was in error in holding that as a matter of law there was no entrapment and in refusing to submit the issue to the jury.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Judgment reversed.

MR. JUSTICE MCREYNOLDS is of the opinion that the judgment below should be affirmed.

Separate opinion of MR. JUSTICE ROBERTS.

The facts set forth in the court's opinion establish that a prohibition enforcement officer instigated the commission of the crime charged. The courts below held that the showing was insufficient, as matter of law, to sustain the claim of entrapment, and that the jury were properly instructed to ignore that defense in their consideration of the case. A conviction resulted. The Government maintains that the issue of entrapment is not triable under the plea of not guilty, but should be raised by plea in bar or be adjudicated in some manner by the court rather than by the jury, and as the trial court properly decided the question, the record presents no reversible error. I think, however, the judgment should be reversed, but for reasons and upon grounds other than those stated in the opinion of the court.

Of late the term "entrapment" has been adopted by the courts to signify instigation of crime by officers of government. The cases in which such incitement has been recognized as a defense have grown to an amazing total.[1] The increasing frequency of the assertion that the defendant was entrapped is doubtless due to the creation by statute of many new crimes, (e. g., sale and transportation of liquor and narcotics) and the correlative establishment of special enforcement bodies for the detection and punishment of offenders. The efforts of members of these forces to obtain arrests and convictions have too often been marked by reprehensible methods.

Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and

[1] See *O'Brien* v. *United States*, 51 F. (2d) 674, footnote 1, p. 678.

deception to obtain evidence of the commission of crime. Resort to such means does not render an indictment thereafter found a nullity nor call for the exclusion of evidence so procured.[2] But the defense here asserted involves more than obtaining evidence by artifice or deception. Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. Federal and state courts have held that substantial proof of entrapment as thus defined calls for the submission of the issue to the jury and warrants an acquittal. The reasons assigned in support of this procedure have not been uniform. Thus it has been held that the acts of its officers estop the government to prove the offense. The result has also been justified by the mere statement of the rule that where entrapment is proved the defendant is not guilty of the crime charged. Often the defense has been permitted upon grounds of public policy, which the courts formulate by saying they will not permit their process to be used in aid of a scheme for the actual creation of a crime by those whose duty is to deter its commission.

This court has adverted to the doctrine,[3] but has not heretofore had occasion to determine its validity, the basis on which it should rest, or the procedure to be followed when it is involved. The present case affords the opportunity to settle these matters as respects the administration of the federal criminal law.

There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan

[2] Compare *Olmstead* v. *United States*, 277 U. S. 438.

[3] *Casey* v. *United States*, 276 U. S. 413.

ought not to be permitted by any self-respecting tribunal. Equally true is this whether the offense is one at common law or merely a creature of statute. Public policy forbids such sacrifice of decency. The enforcement of this policy calls upon the court, in every instance where alleged entrapment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administration of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require.

This view calls for no distinction between crimes *mala in se* and statutory offenses of lesser gravity; requires no statutory construction, and attributes no merit to a guilty defendant; but frankly recognizes the true foundation of the doctrine in the public policy which protects the purity of government and its processes. Always the courts refuse their aid in civil cases to the perpetration and consummation of an illegal scheme. Invariably they hold a civil action must be abated if its basis is violation of the decencies of life, disregard of the rules, statutory or common law, which formulate the ethics of men's relations to each other. Neither courts of equity nor those administering legal remedies tolerate the use of their process to consummate a wrong.[4] The doctrine of entrapment in criminal law is the analogue of the same rule applied in civil proceedings. And this is the real basis of the decisions approving the defense of entrapment, though in statement the rule is cloaked under a declaration that the government is estopped or the defendant has not been proved guilty.

A new method of rationalizing the defense is now asserted. This is to construe the act creating the offense by

[4] See *Hannay* v. *Eve*, 3 Cranch 242, 247; *Bank of United States* v. *Owens*, 2 Pet. 527, 538; *Bartle* v. *Nutt*, 4 Pet. 184, 188; *Hanauer* v. *Doane*, 12 Wall. 342, 349; *Trist* v. *Child*, 21 Wall. 441, 448; *Hazelton* v. *Sheckells*, 202 U. S. 71; *Crocker* v. *United States*, 240 U. S. 74, 78.

reading in a condition or proviso that if the offender shall have been entrapped into crime the law shall not apply to him. So, it is said, the true intent of the legislature will be effectuated. This seems a strained and unwarranted construction of the statute; and amounts, in fact, to judicial amendment. It is not merely broad construction, but addition of an element not contained in the legislation. The constituents of the offense are enumerated by the statute. If we assume the defendant to have been a person of upright purposes, law abiding, and not prone to crime,—induced against his own will and better judgment to become the instrument of the criminal purpose of another,—his action, so induced, none the less falls within the letter of the law and renders him amenable to its penalties. Viewed in its true light entrapment is not a defense to him; his act, coupled with his intent to do the act, brings him within the definition of the law; he has no rights or equities by reason of his entrapment. It cannot truly be said that entrapment excuses him or contradicts the obvious fact of his commission of the offense. We cannot escape this conclusion by saying that where need arises the statute will be read as containing an implicit condition that it shall not apply in the case of entrapment. The effect of such construction is to add to the words of the statute a proviso which gives to the defendant a double defense under his plea of not guilty, namely, (a) that what he did does not fall within the definition of the statute, and (b) entrapment. This amounts to saying that one who with full intent commits the act defined by law as an offense is nevertheless by virtue of the unspoken and implied mandate of the statute to be adjudged not guilty by reason of someone's else improper conduct. It is merely to adopt a form of words to justify action which ought to be based on the inherent right of the court not to be made the instrument of wrong.

It is said that this case warrants such a construction of the applicable act, but that the question whether a similar

construction will be required in the case of other or more serious crimes is not before the court. Thus no guide or rule is announced as to when a statute shall be read as excluding a case of entrapment; and no principle of statutory construction is suggested which would enable us to say that it is excluded by some statutes and not by others.

The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention.[5] Quite properly it may discharge the prisoner upon a writ of *habeas corpus*.[6] Equally well may it quash the indictment or entertain and try a plea in bar.[7] But its powers do not end there. Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty.[8] If in doubt as to the facts it may submit the issue of entrapment to a jury for advice. But whatever may be the finding upon such submission the power and the duty to act remain with the court and not with the jury.

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[5] Compare *Gambino* v. *United States*, 275 U. S. 310, 319.

[6] See *United States ex rel. Hassell* v. *Mathues*, 22 F. (2d) 979.

[7] Compare *United States* v. *Pappagoda*, 288 Fed. 214; *Spring Drug Co.* v. *United States*, 12 F. (2d) 852.

[8] In *United States* v. *Echols*, 253 Fed. 862, upon the tender of a plea of guilty, the court of its own motion examined the prisoner and the officers concerned in his arrest; and being satisfied that these officers had instigated the crime, declared that public policy required that the plea be refused and the case dismissed. In *United States* v. *Healy*, 202 Fed. 349, a judgment and sentence were set aside and the defendant discharged upon the court's ascertaining that the conviction was procured by entrapment.

Such action does not grant immunity to a guilty defendant. But to afford him as his right a defense founded not on the statute, but on the court's view of what the legislature is assumed to have meant, is to grant him unwarranted immunity. If the court may construe an act of Congress so as to create a defense for one whose guilt the act pronounces, no reason is apparent why the same statute may not be modified by a similar process of construction as to the penalty prescribed. But it is settled that this may not be done. *Ex parte United States,* 242 U. S. 27. The broad distinction between the refusal to lend the aid of the court's own processes to the consummation of a wrong and the attempt to modify by judicial legislation the mandate of the statute as to the punishment to be imposed after trial and conviction is so obvious as not to need discussion.

Recognition of the defense of entrapment as belonging to the defendant and as raising an issue for decision by the jury called to try him upon plea of the general issue, results in the trial of a false issue wholly outside the true rule which should be applied by the courts. It has been generally held, where the defendant has proved an entrapment, it is permissible for the government to show in rebuttal that the officer guilty of incitement of the crime had reasonable cause to believe the defendant was a person disposed to commit the offense. This procedure is approved by the opinion of the court. The proof received in rebuttal usually amounts to no more than that the defendant had a bad reputation, or that he had been previously convicted. Is the statute upon which the indictment is based to be further construed as removing the defense of entrapment from such a defendant?

Whatever may be the demerits of the defendant or his previous infractions of law these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors. He has committed the crime in question, but, by supposition,

only because of instigation and inducement by a government officer. To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction. It is to discard the basis of the doctrine and in effect to weigh the equities as between the government and the defendant when there are in truth no equities belonging to the latter, and when the rule of action cannot rest on any estimate of the good which may come of the conviction of the offender by foul means. The accepted procedure, in effect, pivots conviction in such cases, not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment.

The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy.

The judgment should be reversed and the cause remanded to the District Court with instructions to quash the indictment and discharge the defendant.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concur in this opinion.

JOHNSON & HIGGINS OF CALIFORNIA v. UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 166. Argued December 9, 1932.—Decided December 19, 1932.

Cargo, while being carried free on an Army transport, was damaged by water used to put out a fire. Insurers of the cargo having claimed contribution from the Government, and the Judge Advocate

General having advised that the claim was valid, the officer of the Quartermaster Corps who was responsible for the operation of the vessel engaged a private firm to prepare a general average statement for a reasonable compensation. *Held* that the contract was authorized even if the Government was not liable for general average, since that question was not free from doubt and the duty of preparing the statement lay on the officer and in discharging it he was entitled to have the assistance of general average adjusters.
74 Ct. Cls. 331, reversed.

CERTIORARI * to review a judgment rejecting a claim against the United States for services and expenses in preparing a general average statement.

Mr. Cletus Keating, with whom *Mr. Richard L. Sullivan* was on the brief, for petitioner.

Solicitor General Thacher, with whom *Assistant Attorney General Rugg* and *Messrs. H. Brian Holland* and *W. Marvin Smith* were on the brief, for the United States.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The material facts as found by the Court of Claims are these: In December, 1918, fire broke out on the United States Army Transport Logan bound from San Francisco to Manila with a general cargo belonging to various owners. The Logan was under the operation, management and control of the United States. The cargo consisted in part of military supplies for American troops in Siberia and the Philippine Islands, supplies belonging to the government of the Philippine Islands, supplies belonging to the American Red Cross, and a small amount of personal property of officers of the United States Army, all of which was being transported free of charge. In extinguishing the fire some of the cargo was damaged by water; and some or all of the cargo was covered by insurance against general average losses.

* See Table of Cases Reported in this volume.

In August, 1922, the general superintendent and administrative officer of the Army Transport Service of the Quartermaster Corps requested the petitioner, a corporation doing business as average adjuster and insurance broker, to prepare "a statement of general average in order that the responsibility of the various parties concerned may be determined." Attached to this request was a communication from the Acting Judge Advocate General of the United States to the Quartermaster General which referred to the claim of the marine underwriters for contribution in general average and stated: "The claim being a valid one, it is therefore recommended that prompt steps be taken to ascertain the amount due the insurance company by way of contribution in general average. For this purpose, it is recommended that the matter be referred to a general average adjuster." Petitioner accordingly made its investigation and prepared and submitted to the general superintendent of the Army Transport Service at San Francisco the usual general average statement. For this service and incidental disbursements, petitioner made the "usual, customary and reasonable charge" and, upon disallowance of the claim by the Comptroller General, petitioner brought this suit.

The Court of Claims held that the Government was not liable to contribute in general average and that, in consequence, none of its officers had authority to contract for the preparation of a general average statement. The Court of Claims dismissed the petition and this Court granted certiorari.

The Solicitor General, while not formally confessing error, and while reserving the question whether the Government was liable to contribute in general average, is in accord with petitioner's contention that the proper officer of the Government was authorized to employ petitioner for the purpose stated. We are of the opinion that this view is correct. In the circumstances, petitioner's right

did not depend upon the determination of the liability of the Government to contribute in general average. The question of that liability could not be regarded as free from doubt. The cargo underwriters had made claim for contribution and the Judge Advocate General of the Army had advised that the claim was valid. On receiving this information, it was the duty of the officer responsible for the operation of the vessel to prepare the general average statement in order that the basis for adjustment might be available. *Ralli* v. *Troop,* 157 U. S. 386, 400. That duty, in this instance, apart from the question of the liability of the Government for general average as to which it is not now necessary to express an opinion, lay with the general superintendent and administrative officer of the Army Transport Service, and in order that he might properly perform it, he was entitled to avail himself of the assistance of general average adjusters.

Judgment reversed.

PINELLAS ICE & COLD STORAGE CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 182. Argued December 12, 13, 1932.—Decided January 9, 1933.

1. A sale by one corporation to another of all of its property for a money consideration part in cash and the remainder to be paid in instalments evidenced meanwhile by the promissory notes of the vendee, *held* not to be an "exchange" of property for cash and "securities" by a "party to a reorganization," within the meaning of § 203 (b) (3) (h) of the Revenue Act of 1926, which provides that in the transactions to which it refers the gain or loss shall not be considered in computing the income tax of the transferor. P. 468.

2. To constitute a "reorganization" within the meaning of § 203 (b)(3)(h)(A) of the Revenue Act of 1926, it is not essential that there be a merger or consolidation in the technical sense. P. 469. 57 F. (2d) 188, affirmed.

CERTIORARI [1] to review the affirmance of a decision of the Board of Tax Appeals, 21 B. T. A. 425, upholding an added assessment of income tax.

Mr. Albert L. Hopkins, with whom *Messrs. Harry B. Sutter* and *Jay C. Halls* were on the brief, for petitioner.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Erwin N. Griswold* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Petitioner, a Florida corporation, made and sold ice at St. Petersburg. Substantially the same stockholders owned the Citizens Ice and Cold Storage Company, engaged in like business at the same place. In February, 1926, Lewis, general manager of both companies, began negotiations for the sale of their properties to the National Public Service Corporation. Their directors and stockholders were anxious to sell, distribute the assets and dissolve the corporations. The prospective vendee desired to acquire the properties of both companies, but not of one without the other.

In October, 1926, agreement was reached and the vendor's directors again approved the plan for distribution and dissolution. In November, 1926, petitioner and the National Corporation entered into a formal written contract conditioned upon a like one by the Citizens Company. This referred to petitioner as "vendor" and the National Corporation as "purchaser." The former agreed to sell,

[1] See Table of Cases Reported in this volume.

the latter to purchase the physical property, plants, etc., " together with the goodwill of the business, free and clear of all defects, liens, encumbrances, taxes and assessments for the sum of $1,400,000, payable as hereinafter provided." The specified date and place for consummation were eleven A. M., December 15, 1926, and 165 Broadway, New York City, when " the vendor shall deliver to the purchaser instruments of conveyance and transfer by general warranty in form satisfactory to the purchaser of the property set forth. . . . The purchaser shall pay to the vendor the sum of $400,000.00 in cash." The balance of the purchase price ($1,000,000.00) shall be paid $500,000.00 on or before January 31, 1927; $250,000.00 on or before March 1, 1927; $250,000.00 on or before April 1st, 1927. Also, the deferred installments of the purchase price shall be evidenced by the purchaser's 6% notes, secured either by notes or bonds of the Florida West Coast Ice Company, thereafter to be organized to take title, or other satisfactory collateral; or by 6% notes of such Florida company, secured by first lien on the property conveyed, or other satisfactory collateral.

The vendor agreed to procure undertakings by E. T. Lewis and Leon D. Lewis not to engage in manufacturing or selling ice in Pinellas County, Florida, for ten years.

The $400,000 cash payment was necessary for discharge of debts, liens, encumbrances, etc. The Florida Company, incorporated December 6, 1926, took title to the property and executed the purchase notes secured as agreed. These were paid at or before maturity except the one for $100,000, held until November, 1927, because of flaw in a title. As the notes were paid petitioner immediately distributed the proceeds to its stockholders according to the plan.

The property conveyed to the Florida Company included all of petitioner's assets except a few vacant lots worth not more than $10,000, some accounts—$3,000 face value—also a small amount of cash. Assets, not exceed-

ing 1% of the whole, were transferred to the Citizens Holding Corporation as trustee for petitioner's stockholders—99% of all vendor's property went to the Florida Company. The plan of the whole arrangement as carried out was accepted by petitioner's officers and stockholders prior to November 4, 1926.

The Commissioner of Internal Revenue determined that the petitioner derived taxable gain exceeding $500,000 and assessed it accordingly under the Act of 1926. The Board of Tax Appeals and the Circuit Court of Appeals approved this action.

The facts are not in controversy. The gain is admitted; but it is said this was definitely exempted from taxation by § 203, Revenue Act of 1926.

The Act, approved February 26, 1926, c. 27, 44 Stat. 9, 11, 12,—

"Sec. 202. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized.

"(b) . . . . .

"(c) The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

"(d) In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 203.

"(e) . . . . .

"Sec. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

"(b) (1) and (2) . . . . .

"(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

"(4) and (5) . . . . .

"(c) and (d) . . . . .

"(e) If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

"(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

"(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

. . . . . .

"(h) As used in this section and sections 201 and 204—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to an-

other corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

"(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

All of § 203 (b) is in the margin.*

Counsel for the petitioner maintain—

The record discloses a "reorganization" to which petitioner was party and a preliminary plan strictly pursued.

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*Sec. 203 (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment, or if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock

The Florida West Coast Ice Company acquired substantially all of petitioner's property in exchange for cash and securities which were promptly distributed to the latter's stockholders. Consequently, under § 203, the admitted gain was not taxable.

The Board of Tax Appeals held that the transaction in question amounted to a sale of petitioner's property for money and not an exchange for securities within the true meaning of the statute. It, accordingly and as we think properly, upheld the Commissioner's action.

The "vendor" agreed "to sell" and "the purchaser" agreed "to purchase" certain described property for a definite sum of money. Part of this sum was paid in cash; for the balance the purchaser executed three promissory notes, secured by the deposit of mortgage bonds, payable, with interest, in about forty-five, seventy-five, and one hundred and five days, respectively. These notes—mere evidence of obligation to pay the purchase price—were not securities within the intendment of the

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or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(5) If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended.

act and were properly regarded as the equivalent of cash. It would require clear language to lead us to conclude that Congress intended to grant exemption to one who sells property and for the purchase price accepts well-secured, short-term notes, (all payable within four months), when another who makes a like sale and receives cash certainly would be taxed. We can discover no good basis in reason for the contrary view and its acceptance would make evasion of taxation very easy. In substance the petitioner sold for the equivalent of cash; the gain must be recognized.

The court below held that the facts disclosed failed to show a "reorganization" within the statutory definition. And, in the circumstances, we approve that conclusion. But the construction which the court seems to have placed upon clause A, paragraph (h) (1), § 203, we think is too narrow. It conflicts with established practice of the tax officers and if passed without comment may produce perplexity.

The court said—"It must be assumed that in adopting paragraph (h) Congress intended to use the words 'merger' and 'consolidation' in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point."

The paragraph in question directs—"The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation)." The words within the parenthesis may

not be disregarded. They expand the meaning of "merger" or "consolidation" so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation. But the mere purchase for money of the assets of one Company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes. This general view is adopted and well sustained in *Cortland Specialty Co.* v. *Commissioner of Internal Revenue,* 60 F. (2d) 937, 939, 940. It harmonizes with the underlying purpose of the provisions in respect of exemptions and gives some effect to all the words employed.

The judgment of the court below is

Affirmed.

UNITED STATES *v.* ARZNER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 191. Argued December 13, 1932.—Decided January 9, 1933.

Where the holder of a lapsed policy of war-risk term insurance reinstates and converts his insurance into an ordinary life policy and thereafter surrenders this policy upon payment of its cash surrender value, he is entitled, under § 307 of the World War Veterans' Act of 1924, as amended by the Act of July 3, 1930, to recover upon the original term policy for total and permanent disability occurring during the life of such policy, even though the converted

policy, having been previously turned over to the Veterans' Bureau, can not be surrendered by him.
57 F. (2d) 488, affirmed.

CERTIORARI [1] to review the affirmance of a recovery in an action on a war-risk insurance policy.

Mr. Paul D. Miller, with whom *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Mr. W. Clifton Stone* were on the brief, for the United States.

Mr. Samuel H. Williams, with whom *Mr. Stephen F. Chadwick* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Respondent Arzner enlisted in the Army March 29, 1918, and was discharged January 16, 1919. While in the service he took out a war-risk insurance policy for $10,000 on which premiums were paid through January, 1919. The policy lapsed; but March 1, 1920, it was reinstated and then converted into an ordinary life policy. Premiums upon the latter were paid through February, 1921. The respondent then gave up $5,000 of it and received the cash surrender value—$45.00; he surrendered the remaining $5,000 in December, 1921, and accepted the cash value—$18.30.

March 5, 1929, he began this proceeding in the United States District Court. He alleged total disability, resulting from injuries received in battle, commencing in 1918, and sought recovery under his original war-risk insurance policy of 1918—$57.50 per month.

Upon properly framed issues the cause went to trial in June, 1931. The jury found respondent's total and permanent disability commenced September 29, 1918, and returned a verdict in his favor. An appropriate judgment

[1] See Table of Cases Reported in this volume.

followed; the Circuit Court of Appeals, Ninth Circuit affirmed.

Because of conflicting views in the Circuit Courts of Appeals we granted certiorari.

Here, it is said that the court below erred in holding that respondent was entitled to recover upon his original policy since at the time final judgment went down he could not surrender the converted policy as required by § 307, Amended World War Veterans' Act 1924; c. 320, 43 Stat. 607, 627; Act July 3, 1930, c. 849, 46 Stat. 991, 1001. The facts are not in dispute.

Prior to July, 1930, federal courts held divergent views concerning the rights of veterans whose original term insurance policies had lapsed and thereafter had been reinstated or converted into some other form. *Stevens* v. *United States,* 29 F. (2d) 904; *United States* v. *Buzard,* 33 F. (2d) 883; *United States* v. *Kusnierz,* 33 F. (2d) 887; *United States* v. *Cross,* 33 F. (2d) 887; *United States* v. *Allen,* 33 F. (2d) 888. *United States* v. *Barker,* 36 F. (2d) 556; *Duggan* v. *United States,* 36 F. (2d) 804; *Franks* v. *United States,* 43 F. (2d) 455. *United States* v. *Golden,* 34 F. (2d) 367; *United States* v. *Acker,* 35 F. (2d) 646; *United States* v. *Schweppe,* 38 F. (2d) 595; *Woolfolk* v. *United States,* 44 F. (2d) 701; *Crawford* v. *United States,* 40 F. (2d) 199; *United States* v. *Andrews,* 43 F. (2d) 80.

With the evident purpose to accord liberal treatment to those veterans who at any time had become entitled to receive benefits under any insurance policy, Congress by the Act of July 3, 1930, amended World War Veterans' Act, *supra,* so as to read—

"All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to

the provisions of section 23; *Provided,* That the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy; *Provided further,* That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance."

When the trial court rendered final judgment respondent had given up his converted policy and therefore could not surrender it again. For petitioner it is said, that being unable to comply with the literal terms of the 1930 amendment he could not recover under the original (1918) policy. Also—"The Government, of course, does not question the right of a veteran who has converted his term insurance to sue on his prior policy, even if he has allowed the converted policy to lapse, provided he surrenders the converted policy." The suggested construction of the statute is too narrow. It would deprive veterans of a right which we think Congress intended to confer. The probable reason for requiring surrender of the subsequent contract or policy was to prevent any further claim and thus silence controversy.

Undoubtedly, respondent became entitled in September, 1918, during the life of his original policy, to the benefits therein provided. And we think Congress by the Act of 1930 intended to permit him to assert the right which then accrued. To deprive him of this simply because he could not actually surrender a writing already delivered to the United States would defeat the generous purpose behind the enactment.

True it is, respondent agreed to cancellation of his converted policy and accepted the surrender value—a portion of the money paid by him for premiums there-

on. But this action worked no material disadvantage to the Government. Indeed the veteran made payments when in fact entitled to receive monthly benefits for total disability. If the converted policy had been allowed finally to lapse because of nonpayment of premiums, the agreement between the parties would have been fully complied with. Nevertheless the proper admission is that under such circumstances there could have been a recovery on the original policy, upon actual surrender of the expired policy. The Government now has possession of the cancelled converted policy and is in no worse position than it would be in the supposed circumstances.

Affirmed.

FAIRMOUNT GLASS WORKS *v.* CUB FORK COAL CO. ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 314. Argued November 8, 1932.—Decided January 9, 1933.

1. The Circuit Court of Appeals, its rules so providing, may notice a plain error, though not assigned. P. 480.
2. Where the bill of exceptions recited that a motion for a new trial had been made and overruled but omitted to state the ground of the motion, *held* that the omission was not fatal to review, the ground being otherwise manifested in the record. *Id.*
3. The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact applies also to the Circuit Court of Appeals. P. 481.
4. Where the evidence in an action on a contract is such that the plaintiff, if entitled to recover anything, is entitled to substantial damages, but there are issues properly before the jury going to the liability of the defendant, a verdict for the plaintiff limited to nominal damages and costs does not reveal on its face inconsistency with the duty of the jury to assess damages; and where in such case the trial court, without assigning reasons, refuses a new trial, its act can not be held erroneous as a matter of law. P. 483.

5. An exception to instructions, taken after the jury retired, is too late. P. 486.

59 F. (2d) 539, reversed.

District Court affirmed.

CERTIORARI * to review the reversal of a judgment in an action for breach of contract. See also 19 F. (2d) 273; 33 *id.* 420.

Mr. Paul Y. Davis, with whom *Mr. Henry H. Hornbrook* was on the brief, for petitioner.

Facts tried by a jury have been reëxamined otherwise than according to the rules of the common law in violation of the Seventh Amendment as interpreted by this Court. *Parsons* v. *Bedford,* 3 Pet. 433; *Railroad Co.* v. *Fraloff,* 100 U. S. 24; *Wilson* v. *Everett,* 139 U. S. 616; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 246.

A trial court's action in overruling a motion for new trial is not reviewable for error of fact in an appellate court of the United States. *Marine Ins. Co.* v. *Young,* 5 Cranch 187; *Barr* v. *Gratz's Heirs,* 4 Wheat. 213; *Zacharie* v. *Franklin,* 12 Pet. 151, 163; *Browne* v. *Clark,* 4 How. 4, 15; *Doswell* v. *De La Lanza,* 20 How. 29, 32; *Warner* v. *Norton,* 20 How. 448, 461; *Pomeroy's Lessee* v. *Bank of Indiana,* 1 Wall. 592, 593–594; *Mills* v. *Smith,* 8 Wall. 27, 32; *Holder* v. *United States,* 150 U. S. 91, 92.

Circuit Courts of Appeals of other circuits have refused to reëxamine facts tried by juries, or to consider alleged errors of fact arising upon rulings upon motion for new trial.

Mr. Connor Hall, with whom *Mr. C. W. Nichols* was on the brief, for respondents.

The jury did not find but ignored the facts. Where the undisputed evidence showed large damages, it returned nominal damages of only one dollar; and the refusal of

* See Table of Cases Reported in this volume.

the District Court to set aside this verdict was not a decision upon a question of fact but of law, and reviewable by the Circuit Court of Appeals. *James* v. *Evans,* 149 Fed. 136, 141; *Pugh* v. *Bluff City Excursion Co.,* 177 Fed. 399; *Stetson* v. *Stindt,* 279 Fed. 209; *Glenwood Irrigation Co.* v. *Vallery,* 248 Fed. 483; *Smith* v. *United States,* 281 Fed. 696; *United States* v. *Routt County Coal Co.,* 248 Fed. 483, 485.

The petitioner entirely lacks any substantial or meritorious defense, for as the record shows, and as the Circuit Court of Appeals found, it broke its contract wholly without justification.

The verdict should have been set aside and a new trial ordered on appellants' motion. *United Press Assn.* v. *Nat. Newspapers Assn.,* 254 Fed. 284, and cases *supra.*

The judgment below is right without regard to whether the order denying a new trial is appealable; for, the judgment appealed from may be supported upon grounds not considered and reasons not assigned by the Circuit Court of Appeals, *Langnes* v. *Green,* 282 U. S. 531, 538; *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555, 560; and the charge of the District Court as to the measure of damages, was plainly erroneous.

But the order refusing a new trial was appealable. There was not involved any reëxamination of facts, but merely a review of a matter of law. The finding of one dollar damages was arbitrary, not supported by evidence, but contrary to all the uncontradicted evidence of disinterested witnesses; and the setting aside of such verdict is not a matter of discretion but of law. *Mills* v. *Scott,* 99 U. S. 25, 30; *Railroad Co.* v. *Fraloff,* 100 U. S. 24, 31, 32; *Wabash Ry. Co.* v. *McDaniels,* 107 U. S. 454, 456, 463; *Insurance Co.* v. *Folsom,* 18 Wall. 237, 252; *St. Louis & I. M. Ry. Co.* v. *Craft,* 237 U. S. 648, 661; *Pleasants* v. *Fant,* 22 Wall. 116, 120, 121; *Metropolitan R. Co.* v. *Moore,* 121 U. S. 558, 567, 568; *Louisville & N. R. Co.* v.

Woodson, 134 U. S. 614, 623; *Walker* v. *Southern Pac. R. Co.,* 165 U. S. 593, 596; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248, 262; *James* v. *Evans,* 149 Fed. 136, 141; *Pugh* v. *Bluff City Excursion Co.,* 177 Fed. 399; *Stetson* v. *Stindt,* 279 Fed. 209; *Glenwood Irrigation Co.* v. *Vallery,* 248 Fed. 483; *Smith* v. *United States,* 281 Fed. 696.

The judgment of the District Court being subject to reversal, the Circuit Court of Appeals in limiting the new trial to damages followed the practice sanctioned by this Court. *Gasoline Products Co.* v. *Champlin Refining Co.,* 283 U. S. 494.

Mr. Justice Brandeis delivered the opinion of the Court.

Cub Fork Coal Company and Paragon Colliery Company brought this action in the federal court for southern Indiana to recover from Fairmount Glass Works $32,417, with interest, as damages for breach of a contract to purchase 17,500 tons of coal, at $6.50 per ton f. o. b. mines, deliverable in twelve monthly instalments beginning June 1920. Jurisdiction of the federal court was invoked on the ground of diversity of citizenship. The Glass Works pleaded in bar several defenses; and it also set up a counterclaim in the sum of $2,000 as damages for failure to make delivery as provided by the contract. Three trials before a jury were had. At each of the first two the verdict was for the defendant; and each time the judgment entered thereon was reversed by the Circuit Court of Appeals with a general direction for a new trial, 19 F. (2d) 273; 33 F. (2d) 420. On the third trial the plaintiffs recovered a verdict for $1; and, after further proceedings, judgment was entered thereon with costs.

The plaintiffs appealed to the Circuit Court of Appeals "for the reasons set forth in the assignment of errors."

The errors assigned were the failure to give eleven requested instructions. Nine instructions sought related solely to the question of liability. None of the instructions requested and refused related to the measure of damages. But the first asked for a directed verdict for $42,773.50, and the second asked that if a verdict were rendered for the plaintiffs the damages be set at $42,773.50. The charge given was not otherwise excepted to. It had appeared at the trial that after receiving in instalments about 6,330 tons of coal, the defendant refused, on December 4, 1920, to accept further deliveries; and that there was a continuing serious decline in the market price of coal from that date to the end of the twelve months fixed by the contract for delivery. The defendant had insisted upon the several defenses pleaded in bar as well as upon the counterclaim. After the verdict the defendant was allowed to amend the counterclaim, so as to allege that the market price of coal was $11 a ton at the time plaintiffs failed to make the deliveries therein referred to and that the defendant's damages from such failure were $10,000. The record recites that a motion for a new trial was made by the plaintiffs and overruled, and that the overruling was excepted to; but the grounds of the motion, and of the refusal to grant it, are not stated. The errors assigned do not include any reference to the motion for a new trial; or to the exception which was taken to the allowance of the amendment of the counterclaim after verdict.

The Circuit Court of Appeals deemed it unnecessary to consider the nine instructions relating to liability, since the verdict for the plaintiffs "upon the issues which determined liability was amply sustained by the evidence." Nor did it discuss the two instructions which alone referred to the amount of damages recoverable. But it made an order substantially as follows: If within thirty days the parties shall stipulate that the judgment be

modified by substituting for $1 the sum of $18,500 (or other agreed sum) with interest at the rate of five per cent from December 4, 1920 and costs, the judgment as so modified shall be affirmed; otherwise the judgment shall be reversed and a new trial be had "limited only to an ascertainment of appellants' [plaintiffs'] recoverable damages and the amount of appellee's counterclaim, if upon a new trial it appears that appellee is entitled to any recovery or set-off on its counterclaim." 59 F. (2d) 539. As the parties did not stipulate for the modification suggested by the Court of Appeals, it ordered that the judgment be reversed with costs, and that the cause be remanded to the District Court with direction to grant a new trial limited as stated. The defendant petitioned this Court for a writ of certiorari on the ground that the Circuit Court of Appeals, in violation of the Seventh Amendment of the Federal Constitution, re-examined the verdict of the jury otherwise than according to the rules of the common law and reversed the judgment solely for alleged error of fact in the verdict and for the alleged error of the trial court in overruling a motion for a new trial. Certiorari was granted.

The reasons assigned by the Circuit Court of Appeals for its action were substantially these: It appears that a large sum is recoverable as damages; that the minimum recoverable may be determined with substantial accuracy by computation, for the defendant "breached its contract without justification on December 4, 1920" and "the market price of coal is shown for each day of the month, and the average price per month is also disclosed, so that the actual amount of damages is quite definitely ascertainable" despite "a slight discrepancy in the statements of witnesses." The amount shipped and the amount received are also quite definitely ascertainable, despite a discrepancy "due apparently to the fact that the railroad confiscated a small amount of the coal on several occa-

sions." Computing plaintiffs' damages "upon the basis most favorable to the" defendant, and the defendant's damages on the counterclaim also on the basis most favorable to it, plaintiffs appear clearly to be entitled to $18,250 with interest at the rate of five per cent from December 4, 1920 and costs. As the jury fixed the damages at $1, the verdict should have been set aside and a new trial granted. Since in view of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, the court is "not at liberty to direct judgment for such amount as we believe would fairly represent" plaintiffs' damages, the parties should be given the opportunity of disposing of the case without further litigation by entering into an agreement as to the damages. If the parties do not so agree, a new trial should be granted; limited to the ascertainment of damages, as in *Gasoline Products Co.* v. *Champlin Rfg. Co.*, 283 U. S. 494.

If the refusal to grant the motion for a new trial was deemed by the Circuit Court of Appeals plain reversible error it was at liberty under its rules to notice the error although not assigned;[1] and the omission from the record of the grounds of the motion would be no obstacle to a review, since the motion was obviously directed to the failure to award substantial damages.[2] But we are of

[1] Rule 10 (4) of the Circuit Court of Appeals for the Seventh Circuit provides: "The court may notice a plain error not assigned." See *Reliable Incubator & Brooder Co.* v. *Stahl*, 105 Fed. 663, 668. A similar rule obtains in this Court; and in each of the other Circuit Courts of Appeals except the Eighth. For examples of the application of these Rules, see *United States* v. *Tennessee & C. R. Co.*, 176 U. S. 242, 256; *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547, 552; *Weems* v. *United States*, 217 U. S. 349, 358; *Mahler* v. *Eby*, 264 U. S. 32, 45; *New York Life Ins. Co.* v. *Rankin*, 162 Fed. 103, 108. Compare *Pierce* v. *United States*, 255 U. S. 398, 405–406.

[2] Contrast *Reliance Coal & Coke Co.* v. *H. P. Brydon & Bro.*, 286 Fed. 827, 832, where the moving party was the defendant, against whom the verdict had gone.

opinion that the action of the District Court was not reversible error.

First. The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions;[3] and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate.[4] The rule precludes likewise a review of such action by a circuit court of appeals.[5] Its early formulation by this Court was influenced by the mandate of the Judiciary Act of 1789, which provided in § 22 that there should be "no reversal in either [circuit or Supreme] court on such writ of error . . . for any error in fact."[6]

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[3] See *e. g., Henderson* v. *Moore,* 5 Cranch 11, 12; *Marine Ins. Co.* v. *Young,* 5 Cranch 187, 191; *The "Abbotsford,"* 98 U. S. 440, 445; *Railway Co.* v. *Twombly,* 100 U. S. 78, 81. In numerous cases no reference is made, in denying review, to the grounds for the motion. *E. g., Barr* v. *Gratz,* 4 Wheat. 213, 220; *Brown* v. *Clarke,* 4 How. 4, 15; *Kerr* v. *Clampitt,* 95 U. S. 188, 189; *Ayers* v. *Watson,* 137 U. S. 584, 597; *Van Stone* v. *Stillwell & Bierce Mfg. Co.,* 142 U. S. 128, 134; *Holder* v. *United States,* 150 U. S. 91, 92; *Blitz* v. *United States,* 153 U. S. 308, 312; *Clune* v. *United States,* 159 U. S. 590, 591; *Addington* v. *United States,* 165 U. S. 184, 185; *Pickett* v. *United States,* 216 U. S. 456, 461.

[4] *Railroad Co.* v. *Fraloff,* 100 U. S. 24, 31; *Wabash Ry. Co.* v. *McDaniels,* 107 U. S. 454, 456; *Arkansas Cattle Co.* v. *Mann,* 130 U. S. 69, 75; *Fitzgerald Constr. Co.* v. *Fitzgerald,* 137 U. S. 98, 113; *Lincoln* v. *Power,* 151 U. S. 436, 438.

[5] *Chesapeake & Ohio Ry. Co.* v. *Proffitt,* 218 Fed. 23, 28; *Ford Motor Co.* v. *Hotel Woodward Co.,* 271 Fed. 625, 630; *Alaska Packers' Assn.* v. *Gover,* 278 Fed. 927, 929; *Boston & Maine R. Co.* v. *Dutille,* 289 Fed. 320, 324; *Louisiana Oil Refining Corp.* v. *Reed,* 38 F. (2d) 159, 162; *Geo. E. Keith Co.* v. *Abrams,* 43 F. (2d) 557, 558; *Southern Railway Co.* v. *Walters,* 47 F. (2d) 3, 7; *Grand Trunk W. Ry. Co.* v. *Heatlie,* 48 F. (2d) 759, 761.

[6] Act of September 24, 1789, c. 20, 1 Stat. 84–85; compare Rev. Stat. § 1011, 28 U. S. C., § 879. See *Marine Ins. Co.* v. *Young,* 5 Cranch 187, 190; and the discussion in 32 Columbia Law Review, pp. 860–869.

Sometimes the rule has been rested on that part of the Seventh Amendment which provides that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."[7] More frequently the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court.[8]

It has been suggested that a review must be denied because of the historical limitation of the writ of error to matters within the record, of which the motion for a new trial was not a part.[9] Compare Judge Learned Hand in *Miller* v. *Maryland Casualty Co.*, 40 F. (2d) 463. But the denial of review can no longer rest upon this ground, since the record before the appellate court has been enlarged to include in the bill of exceptions a motion for a new trial, made either before or after judgment. Compare *Harrison* v. *United States*, 7 F. (2d) 259, 262. Under certain circumstances the appellate court may enquire into the action of the trial court on a motion for a new trial. Thus, its denial may be reviewed if the trial court

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[7] See *Metropolitan R. Co.* v. *Moore*, 121 U. S. 558, 573; *Williamson* v. *Osenton*, 220 Fed. 653, 655.

[8] *Zacharie* v. *Franklin*, 12 Pet. 151, 163; *United States* v. *Hodge*, 6 How. 279, 281; *Warner* v. *Norton*, 20 How. 448, 461; *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall. 592, 597–598; *Freeborn* v. *Smith*, 2 Wall. 160, 176; *Sparrow* v. *Strong*, 3 Wall. 97, 105; *Ewing* v. *Howard*, 7 Wall. 499, 502; *Chicago* v. *Greer*, 9 Wall. 726, 735; *Insurance Co.* v. *Barton*, 13 Wall. 603, 604; *Newcomb* v. *Wood*, 97 U. S. 581, 583–584; *Railway Co.* v. *Heck*, 102 U. S. 120; *Springer* v. *United States*, 102 U. S. 586, 595; *Missouri Pac. Ry. Co.* v. *Chicago & Alton R. Co.*, 132 U. S. 191; *Fitzgerald Constr. Co.* v. *Fitzgerald*, 137 U. S. 98, 113; *Holmgren* v. *United States*, 217 U. S. 509, 521.

[9] At early common law in England writ of error and motion for a new trial were mutually exclusive remedies. See 1 Holdsworth, History of English Law, p. 226. The motion was addressed to the discretion of the court in banc. 3 Bl. Comm. 392. Review by the Exchequer Chamber of the refusal to grant a new trial was allowed in

erroneously excluded from consideration matters which were appropriate to a decision on the motion, *Mattox* v. *United States,* 146 U. S. 140; *Ogden* v. *United States,* 112 Fed. 523; or if it acted on the mistaken view that there was no jurisdiction to grant it, or that there was no authority to grant it on the ground advanced, *Felton* v. *Spiro,* 78 Fed. 576, 581; *Dwyer* v. *United States,* 170 Fed. 160, 165; *Paine* v. *St. Paul Union Stockyards Co.,* 35 F. (2d) 624, 626–628. It becomes necessary, therefore, to determine whether the circumstances of the case at bar justify an enquiry into the trial court's refusal to set aside the verdict.

Second. It is urged that the motion for a new trial presented an issue of law. The argument is that on the motion or on the court's own initiative the verdict should have been set aside as inconsistent on its face, since if the plaintiffs were entitled to recover at all they were entitled to substantial, not merely nominal, damages. The case, it is contended, is comparable to one in which the award of damages exceeded a statutory limit, see *Southern Ry. Co.* v. *Bennett,* 233 U. S. 80; or was less than an amount undisputed, *Glenwood Irrigation Co.* v. *Vallery,* 248 Fed. 483; *Stetson* v. *Stindt,* 279 Fed. 209; or was in pursuance

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a limited class of cases by the Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, § 35, which provided, however, that "where the application for a new trial is upon Matter of Discretion only, as on the ground that the Verdict was against the Weight of Evidence or otherwise, no such Appeal shall be allowed." Since the Judicature Acts, which abolished proceedings in error in civil cases and substituted an appeal, (see Judicature Act, 1875, 38 & 39 Vict., c. 77, Order 58 (1)), appellate procedure has been regulated by Rules of Court. Compare Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V, c. 49, § 99 (f), as amended by 18 Geo. V, c. 26, § 8. The present Rules provide that applications for new trials are to be made to the Court of Appeal, which shall have the same powers on the hearing as it exercises on an appeal. See Annual Practice, 1933, Order 39, Rules 1 and 2.

of erroneous instructions on the measure of damages, *Chesapeake & O. Ry. Co.* v. *Gainey*, 241 U. S. 494, 496;[10] or was in clear contravention of the instructions of the trial court, *United Press Assn.* v. *National Newspapers Assn.*, 254 Fed. 284; compare *American R. Co.* v. *Santiago*, 9 F. (2d) 753, 757–758.

To regard the verdict as inconsistent on its face is to assume that the jury found for the plaintiff and failed to perform its task of assessing damages. The trial judge was not obliged so to regard the verdict. The defendant had insisted upon several defenses and had set up a counterclaim. The plaintiffs were not entitled to a directed verdict. The evidence was voluminous; and, on some issues at least, conflicting. The instructions left the contested issues of liability to the jury. The verdict may have represented a finding for the defendant on those issues; [11] the reason for the award of nominal damages may have been that the jury wished the costs to be taxed

[10] Compare, also, *James* v. *Evans*, 149 Fed. 136; *East St. Louis Cotton Oil Co.* v. *Skinner Bros. Mfg. Co.*, 249 Fed. 439; *Eteepain Co-op. Society* v. *Lillback*, 18 F. (2d) 912, 915.

[11] See *Olek* v. *Fern Rock Woolen Mills*, 180 Fed. 117; *Vanek* v. *Chicago G. W. R. Co.*, 252 Fed. 871; *Fulmele* v. *Forrest*, 27 Del. 155; 86 Atl. 733. In a number of instances state appellate courts have taken this view of the verdict. *Spannuth* v. *C. C. C. & St L. Ry. Co.*, 196 Ind. 379; 148 N. E. 410; *Hubbard* v. *Mason City*, 64 Iowa 245; 20 N. W. 172; *Wavle* v. *Wavle*, 9 Hun 125; *Snyder* v. *Portland Ry., L. & P. Co.*, 107 Ore. 673, 678–684; 215 Pac. 887; *Krulikoski* v. *Sparling*, 82 Wash. 474; 144 Pac. 692 (but see *Bingaman* v. *Seattle*, 139 Wash. 68, 72–73; 245 Pac. 411); see *Haven* v. *Missouri R. Co.*, 155 Mo. 216, 223; 55 S. W. 1035. Contra: *Miller* v. *Miller*, 81 Kans. 397; 105 Pac. 544; *Bass Furniture Co.* v. *Electric Supply Co.*, 101 Okla. 293; 225 Pac. 519; see *Johnson* v. *Franklin*, 112 Conn. 228; 152 Atl. 64. Compare *Pugh* v. *Bluff City Excursion Co.*, 177 Fed. 399, in which the jury returned a verdict for nominal damages after the trial court, upon the jury's request to rule on the propriety of this, gave an instruction couched in generalities.

against the defendant. The defendant did not complain of the verdict. The record before us does not contain any explanation by the trial court of the refusal to grant a new trial, or any interpretation by it of the jury's verdict.[12] In the absence of such expressions by the trial court in the case at bar, the refusal to grant a new trial cannot be held erroneous as a matter of law. Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct. Compare *Union Pacific R. Co.* v. *Hadley,* 246 U. S. 330, 334; *Dunn* v. *United States,* 284 U. S. 390, 394.

Third. It is urged that the refusal to set aside the verdict was an abuse of the trial court's discretion, and hence reviewable. The Court of Appeals has not declared that the trial judge abused his discretion. Clearly the mere refusal to grant a new trial where nominal damages were awarded is not an abuse of discretion. This Court has frequently refrained from disturbing the trial court's approval of an award of damages which seemed excessive or inadequate,[13] and the circuit courts of appeals have generally followed a similar polity.[14] Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion, we have no occasion to determine.

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[12] Compare *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Moquin,* 283 U. S. 520, in which the trial court, expressing the opinion that the verdict was excessive because of passion and prejudice, nevertheless refused, on the filing of a remittitur, to grant a new trial.

[13] See *Wilson* v. *Everett,* 139 U. S. 616, 621; *Herencia* v. *Guzman,* 219 U. S. 44, 45; *Southern Ry. Co.* v. *Bennett,* 233 U. S. 80, 86–87; *St. Louis, I. M. & S. Ry. Co.* v. *Craft,* 237 U. S. 648, 661; *Louisville & N. R. Co.* v. *Holloway,* 246 U. S. 525, 529; and cases cited in note 4, *supra.*

[14] See cases cited in note 5, *supra.* Compare, however, *Cobb* v. *Lepisto,* 6 F. (2d) 128.

Fourth. The respondents contend that the District Court erred in charging that the measure of damages was the difference between the contract price and the market price at the time of the breach, instead of the market prices at the times for delivery; and that this error may be relied upon here in support of the judgment of the Court of Appeals. Compare *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435–436; *Langnes* v. *Green*, 282 U. S. 531, 538; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 561. There was no request for an instruction on this subject and no objection was made to that given until after the jury had retired. The trial judge was under no obligation to recall the jury. Moreover, the instruction given and the refusal to recall the jury were not assigned as error on appeal to the Court of Appeals; nor did that court mention the matter. Under the Rules of both the Court of Appeals and this Court the exception taken after the jury retired came too late to furnish a basis for review.[15] We have, therefore, no occasion to consider the meaning of the charge given, its correctness as a matter of law, or the materiality of the error, if any, in giving it.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

Reversed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO, dissenting.

A verdict found in contravention of the instructions of the court may be reversed on appeal as contrary to law. So much the prevailing opinion apparently concedes.

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[15] See Rule 9, paragraph 1, of the Rules of the Circuit Court of Appeals for the Seventh Circuit; and Rule 8, paragraph 1, of the Rules of this Court. Also *Phelps* v. *Mayer*, 15 How. 160, 161; *Hickory* v. *United States*, 151 U. S. 303, 316; *Ford Hydro-Electric Co.* v. *Neely*, 13 F. (2d) 361.

The verdict of $1 returned by the jury upon the trial of this cause may not be squared with their instructions and hence was properly annulled.

By the instructions of the trial judge they were required, if they found that the defendant had broken its contract, to award to the plaintiffs the difference between the contract price of the coal and its market value, after allowance for the defendant's counterclaim. The evidence most favorable to the defendant, both as to claim and counterclaim, made it necessary, if there was any breach, to return a substantial verdict, the minimum being capable of accurate computation. The distinction is not to be ignored between this case of a breach of contract and the cases cited in the prevailing opinion where the liability was in tort. Here the minimum, if not the maximum, damages are fixed and definite. There the discretion of the jury was not subject to tests so determinate and exact. The question is not before us whether even in such circumstances there may be revision on appeal. Cf. *Pugh* v. *Bluff City Excursion Co.*, 177 Fed. 399. Enough for present purposes that in the circumstances of the case at hand the verdict for $1 is a finding that the contract had been broken, and this irrespective of the motive that caused the verdict to be given. What the motive was we cannot know from anything disclosed to us by the record. Nothing there disclosed lays a basis for a holding that the nominal verdict for the plaintiffs was designed to save them from the costs which the law would have charged against them if there had been a verdict for defendant. The jury were not instructed as to the liability for costs, and for all that appears had no knowledge on the subject. Nor would such a motive, if there were reason to ascribe it, rescue them from the reproach of disobedience and error. It would merely substitute one form of misconduct for another. It would do this, moreover, in contradiction of the record. By no process of mere

construction can a verdict that nominal loss has resulted from a breach be turned into a verdict that there had been no breach at all. On the face of the record, the jury found there was a wrong, and then, in contravention of instructions, refused, either through misunderstanding or through wilfulness, to assess the damages ensuing.

Justice is not promoted in its orderly administration when such conduct is condoned.

WABASH VALLEY ELECTRIC CO. *v.* YOUNG ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA.

No. 128. Argued December 7, 1932.—Decided January 9, 1933.

1. In fixing rates of a public utility for part of the territory served, conditions may be such as to require or permit that the property used and useful in serving the smaller area be treated as the rate base rather than the entire plant serving the whole territory. P. 497.
2. An electrical plant, built and operated as a generating and distributing plant for a single municipality, became part of a large system. The new owner ceased to generate current locally and brought in current over its lines from without. It served many other towns and cities, and also delivered varying proportions of the entire current borne by its lines to affiliated companies for delivery to their customers, including many towns and cities within their respective territories. *Held:*

   (1) That under the Indiana Public Utility Act, the municipality was properly treated as the unit for determining the rates to be charged therein, and that this is consistent with due process. Pp. 495–498.

   (2) The property to be valued is that which is used and useful for supplying current to the municipality, adding thereto the proportionate part of the value of the general distributing system fairly attributable to the local service, but disregarding local plants in other municipalities which are separate and distinct and bear no relation to the one in question. P. 499.

(3) The calculation is of necessity more or less approximate, but must be fair. P. 499.

(4) No allowance for cost of financing need be made in the absence of evidence that such a cost was incurred, or that it necessarily would be incurred in the event of reconstruction. P. 500.

(5) Rate case expenses of the utility on matters not connected with the valuation are properly disallowed; and the conclusion of the state commission, the master and the court as to the proper allowance will not be disturbed when not definitely shown to be erroneous. P. 500.

3. The fact that an electric power company is in a favorable financial position through being a subsidiary of a larger one may be taken into account in determining the rate of return to which it is entitled. P. 501.
4. What may be an inadequate percentage of return on capital to one kind of public utility in its particular circumstances, may be adequate for another kind in different circumstances. *United Railways* v. *West*, 280 U. S. 234. P. 501.
5. Seven per cent. rate of return is not shown to be confiscatory under the facts disclosed in this case. P. 502.

1 F. Supp. 606, affirmed.

APPEAL from a decree of the District Court of three judges dismissing for want of equity a bill to restrain the enforcement of rates fixed by the defendant Indiana Commission for electric service in the City of Martinsville.

Mr. John C. Lawyer, with whom *Messrs. George A. Cooke, Francis L. Daily,* and *Howard S. Young* were on the brief, for appellant.

It is established by undisputed evidence: (1) That appellant's system as a whole is earning only 4.15% on its value; (2) That appellant's rates in the various cities, towns and communities served by it are uniform for the same classes of service; and (3) That the rates fixed by the Commission for Martinsville amount to approximately a 15% reduction.

The basis of utility rates is the fair value of the property used for the convenience of the public. *Minnesota Rate Cases*, 230 U. S. 352, 434–5; *Smyth* v. *Ames*, 169

U. S. 466, 547; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 408; *Southwestern Bell Tel. Co.* v. *Public Service Comm'n*, 262 U. S. 276, 287.

Confiscation can not be determined by a single rate or group of rates, but must be judged from the effect on the entire business done by the utility within the area served. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 54; *State Public Utilities Comm'n* v. *Springfield Gas & Elec. Co.*, 291 Ill. 209, 228, 229; *Michigan Bell Tel. Co.* v. *Odell*, 45 F. (2d) 180, 181–2; *New York Telephone Co.* v. *Prendergast*, 36 F. (2d) 54, 69; *United Railways* v. *West*, 280 U. S. 234, 252–253; *St. Louis & S. F. Ry. Co.* v. *Gill*, 156 U. S. 649, 665, 666; The Municipality as a Unit for Utility Valuation, 14 Yale L. J. 912; *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574, 580–581; *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, 350–351; *N. Y. ex rel. Gas Co.* v. *Public Service Comm'n*, 269 U. S. 244, 248–249; *Norfolk & Western Ry. Co.* v. *West Virginia*, 236 U. S. 605, 608–609; *Minnesota Rate Cases*, 230 U. S. 352; *Ames* v. *Union Pacific Ry. Co.*, 64 Fed. 165, 179, aff'd 169 U. S. 466; *Groesbeck* v. *Duluth, S. S. & A. Ry. Co.*, 250 U. S. 607.

The value in question is that of the property actually used and not of what may be considered by some one to be an efficient substitute. *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 417–418.

The right to regulate does not warrant an unreasonable interference with the right of management or the taking of the company's property without compensation. *Chicago, M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491, 501.

The evidence shows prudent management about a matter requiring business judgment. The Commission is not the financial manager of the corporation and is not empowered to substitute its judgment for that of the directors. *Southwestern Bell Tel. Co.* v. *Public Service Comm'n*, 262 U. S. 276, 288–289; *United Gas Co.* v. *Rail-*

road Comm'n, 278 U. S. 300, 320–321. Public interest can not be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon a utility and its property burdens that are not incident to its engagement. *Northern Pac. Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595–6.

These principles, applied to this case, clearly mean that appellant is protected in the dedication of its property as a unit to the public service and that the State under the guise of regulation may not dismember that property and subject portions of it to uses to which appellant has never submitted them. It is plainly apparent that the owner might be perfectly willing to serve fifty interconnected towns as a unit, and not be willing to serve any of them separately.

Having by reasonable and lawful methods acquired a given operating unit of utility property, he has the constitutional right to insist that that unit shall as a whole be permitted at all times to yield to him a fair return upon its value, and that the State may not, whatever its local forms, deprive that unit of property of such earnings. There is no suggestion in this record of unreasonableness or unlawfulness in the establishment of the operating unit serving the fifty towns, cities and rural communities located on appellant's interconnected systems. On the contrary all of the evidence establishes the reasonableness and economy of the system.

The public service commissions of the various States quite generally recognize that the proper unit for testing rates is the used and useful property which makes up the operating unit, and they have generally refused to make the municipality the rate unit. [Citing from many public utility decisions.]

If Martinsville is to be treated as a segregated unit, the allocation of power system property to Martinsville use, and the fixing of a "gateway" cost for electric

energy supplied Martinsville, must be on a use basis and not by averaging. *Northern Pac. Ry. Co.* v. *Dep't of Pub. Wks.*, 268 U. S. 39, 42–5; *Chicago, M. & St. P. Ry. Co.* v. *Public Utilities Comm'n*, 274 U. S. 344, 351; *Wood* v. *Vandalia R. Co.*, 231 U. S. 1, 3–4.

The court erred in finding the value of the appellant's used and useful property; in finding that no costs of financing would be incurred in reproducing any of appellant's property; in finding that only $4,000.00 should be charged to operating expenses for the expenses of this rate case when the actual expenses were shown to be in excess of $60,000.00; and in finding that a return of 7% upon the fair value of the property used and useful in the public service is a reasonable return. *United Railways* v. *West*, 280 U. S. 234, 251–52; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 419.

An eight per cent. return was allowed in the following cases: 262 U. S. 443, 445; 6 F. (2d) 243, 273–4, 280; 10 F. (2d) 252, 255; 7 F. (2d) 192, 194–5, 218, aff'd 278 U. S. 322; 16 F. (2d) 615, 622, 638; 26 F. (2d) 912, 924–5; 36 F. (2d) 54, 67–9; 45 F. (2d) 180, 182–3; 57 F. (2d) 735, 745, 754; 1 F. (2d) 351, 370.

The Commission can not ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.

Messrs. Arthur L. Gilliom and *George Hufsmith*, Assistant Attorney General of Indiana, with whom *Messrs. James M. Ogden*, Attorney General, and *Ralph K. Lowder* were on the brief, for appellees.

Mr. Justice Sutherland delivered the opinion of the Court.

Appellant is one of seven affiliated public utility corporations organized under the laws of Indiana, more than

99 per cent. of the combined capital stock and securities of which is owned by the Central Indiana Power Company. The officers and directors of the several corporations are the same, and the operations of the entire group are under a common control, so that in substance the business of all is carried on as though they constituted a single entity. Their lines are interconnected, and the electrical energy distributed by them is drawn from common sources. Appellant owns and operates an interconnected system in a territory comprising thirteen counties of the state, and sells and distributes electric current to approximately fifty cities and towns therein, including the inhabitants of the City of Martinsville, and also to a large number of industrial plants and customers outside the limits of such cities and towns. Appellant's system consists in the main of general transmission and transformation properties, and local distributing plants. Among other local plants it owns one in the City of Martinsville, which was built by former owners to supply that city and its inhabitants. In the hands of the original owners this was a separate and complete plant, generating electrical energy as well as distributing it.

Nearly all the electric current distributed by appellant is " purchased " by it from one of the other affiliated corporations which has had in operation since 1924 an extensive and modern generating plant known as the " Dresser Plant." The combined needs of the affiliated corporations have so increased that for the year ending May 31, 1930, the total current used greatly exceeded that supplied by the Dresser Plant; and in order to meet the increased demand the affiliated system was connected with other large generating plants in Indiana and Ohio. In furtherance of the general plans of the affiliated group, appellant some years ago purchased the local electric plant at Martinsville and similar plants in many other

cities and towns within the thirteen counties above referred to.

The Martinsville plant now is operated by appellant under an indeterminate permit from the state in virtue of the provisions of the state Public Utility Act. 3 Burns Ann. Ind. Stat., 1926, § 12672, *et seq.* The current is fed into this plant from outside sources, principally from the Dresser Plant. Section 57 of the Public Utility Act (*supra,* § 12728) authorizes, among others, any municipal organization or any ten persons directly interested to make complaint to the Public Service Commission challenging any rates, tolls, etc., as unreasonable or unjustly discriminatory. Under that provision, on March 16, 1927, seventeen citizens of Martinsville, patrons of appellant, filed with the Public Service Commission of Indiana a petition seeking a reduction in electric rates, in which petition the City of Martinsville subsequently joined. At that time, and prior thereto, appellant had on file with the commission a schedule of rates applicable only in that city. After hearings, the commission made an order, effective as of February 1, 1929, reducing the rates for electric service to be charged and collected by appellant in Martinsville.

Appellant, being dissatisfied with these rates and asserting that they were confiscatory, brought suit in the federal district court for the southern district of Indiana to enjoin the commission and others from enforcing the order. The City of Martinsville intervened and filed an answer in support of the rates. The court issued a temporary injunction and referred the case to a special master to hear and report the evidence to the court, together with his findings of fact and conclusions of law. The master heard the case and made a report of the evidence and of his findings of fact and conclusions thereon, to which appellant filed a large number of exceptions. The district court, consisting of three judges (§ 266 of the Judicial Code, U. S. C., Title 28, § 380), approved the report of

the master and also made findings of fact and conclusions of law in accordance with Equity Rule 70½, and, thereupon, delivered an opinion and entered a decree dissolving the temporary injunction, directing appellant to refund to its customers all amounts collected from them in excess of those which it would have collected under the schedule of rates complained of, and dismissing the bill for want of equity. 1 F. Supp. 106.

Rate base. The court below held that under the provisions of the state statute and in the light of the facts, not the entire property and system of appellant, but the City of Martinsville alone should be treated as the unit for the purpose of determining the schedule of rates to be charged therein. The commission, as well as the master, had reached the same conclusion. Upon that basis, in fixing the value of the property used and useful for supplying electric current to the city, the court determined the value of the local property, to which it added that proportionate part of the value of the system property which it found to be fairly attributable to the Martinsville service.

Appellant's chief contention is that its entire operating property should be taken as a unit in fixing the rate base, and that the action of the court in failing to do so deprived it of its property without due process of law.

The Martinsville plant, prior to its acquisition by appellant, had produced within itself the whole of the electric current which its owners sold and distributed. That it then was a distinct unit for the purpose of fixing rates, if and when necessary, is, of course, clear. If the former owners had simply abandoned the use of the local generating appliances and purchased electric current from outside sources, the plant, for all purposes of rate making and regulation, would have remained a distinct and separate unit. It was this unit which appellant acquired; and if appellant had continued to operate it as it then was

being operated, that is to say, as a generating, as well as a distributing, plant for the entire electric current supplied to the city, the value of the plant with appropriate allowances for expenses, etc., would have continued to be the lawful rate base. But that method of operation was abandoned; and the question is whether, because the local plant now is interconnected with appellant's general distributing system and the electric current is drawn from outside sources, the city still may be treated as a separate unit for rate making purposes.

The answer primarily depends upon the meaning and application of the state Public Utility Act. The Supreme Court of Indiana thus far has not dealt with the question; but the Supreme Court of Wisconsin, construing an act of that state essentially the same as the Indiana act, has determined that the Wisconsin commission was "required to treat the municipality as a unit and to base its rate upon the cost to the utility of serving the individual municipality rather than the average cost of serving many distinct and scattered municipalities." *Eau Claire* v. *Wisconsin-Minnesota L. & P. Co.*, 178 Wis. 207, 220; 189 N. W. 476, 481. This result was deduced by the Wisconsin court (pp. 217 *et seq.*) not from any express provision of the statute, but from a consideration of many correlated statutory provisions and in the light of "the history of commercial, economic, and political development." That court pointed out that when the Public Utility Act was enacted, each municipality was charged with the duty of furnishing public utility service and endowed with power to perform that duty; that each municipality had, and dealt with, an individual public utility; that there was no great development of power by a single utility serving numerous municipalities scattered far and wide; and, hence, that present day developments could not have been within the contemplation of

the legislature because they did not exist. The court stressed the fact that, notwithstanding the subsequent large developments of power which had come about since the passage of the utility law, there had been no modification of that law, which, in the light of conditions then existing, must have "regarded the municipality as the entity on the one hand and the utility as the entity on the other, for the purpose of establishing just and reasonable rates and service." Upon these considerations and others, the court reached the conclusion above stated.

Since the Indiana act was patterned after the Wisconsin act with a like history and attended by similar circumstances, the court below felt warranted in following the decision of the Wisconsin court; and with that view we see no reason to disagree. Whether the method afforded by the state statute thus construed is in accordance with sound policy is a question with which we are not concerned. See *Wabash, St. L. & P. Ry. Co.* v. *Illinois,* 118 U. S. 557, 577; *Minnesota Rate Cases,* 230 U. S. 352, 416. The only question we are called upon to consider is whether, under the due process clause of the Fourteenth Amendment, the method is constitutional.

Normally, the unit for rate making purposes, we may assume, would be the entire interconnected operating property of a utility used and useful for the convenience of the public in the territory served, without regard to particular groups of consumers or local subdivisions. But conditions may be such as to require or permit the fixing of a smaller unit. Compare *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300; *United Fuel Gas Co.* v. *Pub. Serv. Commn., id.,* 322; *Minnesota Rate Cases, supra,* at pp. 434–436; *Smith* v. *Illinois Bell Tel. Co.,* 282 U. S. 133, 148, *et seq.; Houston* v. *Southwestern Bell Tel. Co.,* 259 U. S. 318, 322.

The three cases last cited recognize that where the business of a carrier or utility is both interstate and intra-

state, the state rates for intrastate transportation or business must be determined by a separate consideration of the value of the property employed in the intrastate business. It is true that there such a separation is made necessary because a different government exercises the rate making power in each of the two fields of regulation; and that situation is wanting here. Nevertheless, the cases furnish a helpful illustration in support of the application of a similar rule in the case now under review. Compare *United Fuel Gas Co.* v. *Railroad Commission,* 13 F. (2d) 510, 522; *United Fuel Gas Co.* v. *Public Service Commn.,* 14 F. (2d) 209, 223; *Idaho Power Co.* v. *Thompson,* 19 F. (2d) 547, 571; and see *International Ry. Co.* v. *Prendergast,* 1 F. Supp. 623, 626.

In addition to what already has been said, it should be noted that appellant not only furnishes electric current to the fifty separate and unrelated towns and cities, in none of which the plant is used or useful for the rendition of service to any other town or city, but appellant also carries over its lines and delivers to others of the affiliated companies, as intercorporate transactions, varying portions of the entire current borne by its lines for subsequent distribution by the affiliated companies to their customers, including many towns and cities within their respective territories. This intermingling of the business and distributing activities of the several companies results in such elements of uncertainty in respect of the proper evaluation of appellant's participation therein that, standing alone, it would go far in the direction of justifying the rejection of the contention that the due process clause requires that appellant's entire distributing system should be included in the basic unit. In the light of all the facts and circumstances, we hold that an adjustment of rates for the municipality here served by appellant in accordance with the method adopted below is consonant with state law and immune from constitutional attack.

Valuation and Expense Allowances. Appellant further contends that, assuming this method to be free from constitutional objection, the valuation put upon the property is so low as to result in confiscation. To meet this objection it is only necessary that there shall be brought into the rate base the value of all property of appellant which is in fact used and useful for supplying the electric current to the city. Manifestly, the local plants in other towns and cities bear no such relation to the Martinsville plant. As already shown, these various plants are separate and distinct from one another, and they were properly left out of the calculation. See *Hardin-Wyandot Lighting Co.* v. *Public Utilities Commn.,* 118 Ohio St. 592, 601; 162 N. E. 262. The property values fixed by the commission and those fixed by the master and approved by the court differ to some degree, but not so materially as to affect the result. Upon the basis adopted, that is, first to value the local property and then add that proportionate part of the value of the general distributing system found to be fairly attributable to the Martinsville service, the figures finally arrived at by the master and the court were $102,947 for the local plant, and $101,191 for the proportionate value of the other property, or a total of $204,138. In arriving at the second figure a proportionate part of the total value of the general system was allocated to Martinsville "on the basis of the ratio of actual sales of Kw. H. to Martinsville and its consumers to the total sales of Kw. H. by plaintiff during the year 1929, that being the last calendar year before the date of the hearing." This ratio was arrived at and supported by a variety of calculations, the results differing slightly, and upon these various calculations the court fixed 3.3 per cent. as the fair ratio of the value to be allocated to Martinsville.

We deem it unnecessary to repeat the details which led to the court's conclusion. The findings of the court and

of the master are full and convincing and give evidence of careful and thorough consideration. The deductions from the evidence and the calculations are of necessity more or less approximate (*Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 190), but we find nothing in the record which casts a substantial doubt upon their essential fairness.

Complaint is made that in determining the value of the Martinsville property no allowance was made for cost of financing. As the court below, however, pointed out, there was no evidence that such cost was incurred, or that it necessarily would be incurred in the event of reconstruction. This is also in accordance with the findings of the master. We see no reason to interfere. See *Vincennes Water Supply Co.* v. *Public Service Commn.,* 34 F. (2d) 5, 9.

The commission, the master, and the court below all rejected as exorbitant the claim of appellant for an allowance of $60,000 rate case expenses, and allowed the sum of $4,000, to be amortized as an operating charge over a period of ten years. This action, it is contended, was arbitrary and without basis in the evidence. While there is evidence in the record that appellant expended the amount claimed, there is further evidence justifying the conclusion that a large part of the expenditure was made for the additional purpose of securing data relating to a merger proceeding with which the Martinsville rates are in no way connected. There is also evidence that the appraisal covered the local property in the other municipalities, which, as we have seen, are without relation to the Martinsville distribution. From a consideration of all the evidence it seems clear that the refusal to allow, as against the Martinsville plant, the entire $60,000 was well founded. That being so, it became necessary to fix that part of the sum reasonably chargeable as an expense of the Martinsville rate case. The commission and the master, who heard the evidence and were familiar with all the details,

reached the same conclusion as to the amount. While it may be true that even upon the view taken a larger sum than $4,000 might well have been allowed, we find nothing sufficiently definite in the record to require us so to determine, or to call for a disturbance of the amount fixed.

Rate of return. The court below found that a rate of return of 7 per cent. was adequate. The evidence is conflicting. Witnesses for appellees estimated that 7 per cent. was sufficient. The testimony for appellant was to the effect that to take care of bonds, debt discounts, borrowed money and stock dividends a return of 7 per cent. was sufficient; but that in order to accumulate a surplus and make it easier to finance the company, the rate of return should be not less than 8 per cent. Appellant's balance sheets show that on January 1, 1929, it had an accumulated surplus of $1,074,739.71, and, at the end of that year, a surplus of $1,257,884.64, as compared with a total stock and funded debt liability of about $4,500,000. The record, as already stated, also shows that appellant is a subsidiary of the Central Indiana Power Company by which it is owned and financed, its securities having been taken directly by that company without any intervening agency. The power company also owns and finances the other affiliated corporations in the same way. It is reasonable to conclude that appellant is in a more favorable financial condition than if it were a disconnected enterprise.

It is true, as appellant points out, that in *United Railways* v. *West,* 280 U. S. 234, 251–252, this court held that a rate of return for a street railway of less than 7.44 per cent. was confiscatory, saying that sound business management required that after paying all expenses of operation, etc., "there should still remain something to be passed to the surplus account;" and that a rate of return which did not admit of that being done was not sufficient to enable a utility to maintain its credit and raise money

for the proper discharge of its public duties. Many cases were cited tending to show that a return of 7½ per cent. or even 8 per cent. might be necessary, but it was said (pp. 249–250) that no rule could be laid down which would apply uniformly to all sorts of utilities. "What may be a fair return for one may be inadequate for another, depending upon circumstances, locality and risk." A street railway company, compelled to meet the growing competition of private automobiles, public omnibuses, and other motor carriers, well might sustain such losses of revenue because of the decreased number of passengers carried, as to require a larger rate of return than would be required by an electric utility company like appellant, which not only enjoys a practical monopoly in the field where its services are rendered, but whose financial structure, it fairly may be assumed, is greatly strengthened by its affiliations and by the interested support of the parent company to which it belongs. On the whole we are unable to conclude that a 7 per cent. rate of return, under the facts here disclosed, is so low as to be confiscatory. See *Smith* v. *Illinois Bell Tel. Co., supra,* at pp. 160–161.

Moreover it appears, as the master and the lower court found, that if the rates complained of had been in force during the period beginning January 1, 1929, and ending May 31, 1930, the return would have been much in excess of 7 per cent. on the value fixed.

Decree affirmed.

ATLANTIC COAST LINE R. CO. ET AL. *v.* FORD.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 194. Argued December 14, 1932.—Decided January 9, 1933.

1. If due process is afforded by provisions of a state statute as construed and applied by the state supreme court in the case under review, the appellant can not complain that in earlier cases they

were so construed and applied as to deny due process to other litigants. P. 505.

2. A state statute that raises a presumption of negligence against the railroad in a grade crossing accident upon proo of failure to give prescribed warning signals, is not contrary to due process if the presumption amounts merely to a temporary inference which may be rebutted by evidence and is thereafter to be excluded in determining proximate cause. *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, and *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639, contrasted. P. 506.
3. Limiting such presumption of negligence to railway companies does not deprive them of equal protection of the laws. P. 509.
4. The presumption does not violate the commerce clause. *Id.*
5. Instructions to a jury are to be reasonably interpreted; if they are not sufficiently definite, the omissions complained of should be pointed out when exceptions are taken. P. 507.

Affirmed.

APPEAL from a judgment sustaining a recovery against the railroad company in an action for personal injuries.

Mr. Henry E. Davis, with whom *Messrs. F. B. Grier* and *Thomas W. Davis* were on the brief, for appellants.

Mr. W. C. Davis for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action brought by appellee in a South Carolina state court of first instance against the railroad company and its engineer to recover for injuries said to have been sustained by her as the result of a collision at a public highway crossing between an automobile in which she was riding and a passenger train of the company. The complaint alleges several grounds of negligence, but the only one necessary for our consideration is that appellants negligently failed to give the crossing signals provided for by the state law.

By § 4903, Vol. 3 of the Code of South Carolina (1922), a railroad company is required to place on each locomotive engine a bell of at least thirty pounds weight and a steam or air whistle, and "such bell shall be rung or such whistle sounded by the engineer . . . at the distance of at least five hundred yards from the . . . traveled place, and be kept ringing or whistling until the engine . . . has crossed such highway . . ."

Section 4925 provides:

"*Injuries at Crossings—Penalty and Damages.*—If a person is injured in his person or property by collision with the engines or any car or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this Chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding Section, unless it is shown that in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross [or] wilful negligence or unlawful act contributed to the injury."

Appellants answered the complaint, denying liability and setting up affirmative defenses. The cause was tried before the court and a jury. At the close of the evidence, appellants moved for a directed verdict in their favor upon the ground, among others, that §§ 4903 and 4925 of the code, as they had been construed, constituted a violation of the due process of law and equal protection of law clauses of the Fourteenth Amendment, and an unlawful attempt to regulate interstate commerce. The motion was overruled, and the jury after being instructed returned a verdict in favor of plaintiff,

upon which judgment was duly entered. The state supreme court affirmed the judgment.

The attack upon the statute as contravening the due process clause is based upon the contention, shortly stated, that the state supreme court, by affirming the judgment, in effect construed the statute to mean that failure to give the prescribed signals is negligence *per se* and raises a presumption that such failure is the proximate cause of the collision and warrants recovery by the plaintiff without further proof, *and that such presumption does not vanish from the case upon the introduction of evidence by the railroad company, but remains throughout to be considered by the jury as evidence.* We have italicized the words which are said by appellants to constitute the crux of their contention.

Appellants review many decisions of the state supreme court dealing with the question, which seem not to be altogether in agreement; but it is not necessary to analyze these decisions and from them attempt to extract the rule. The court below has done this and reached a conclusion contrary to that advanced by appellants; and that is enough for the purposes of our decision here. If the assailed provisions as construed and applied in the present case afford due process, appellants cannot complain that in earlier cases they were so construed and applied as to deny due process to other litigants. Compare *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co., ante,* p. 358; *Patterson* v. *Colorado,* 205 U. S. 454, 460; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 680; *Dunbar* v. *New York,* 251 U. S. 516, 518–519; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 452; *Fleming* v. *Fleming,* 264 U. S. 29, 31.

The jury, upon this subject, was instructed as follows:

". . . under that statute, it is incumbent upon the plaintiff here first to prove that the crossing signals were

not given, . . . and then she must prove, and prove both by the preponderance of the evidence as I have already charged you, that that failure to give the signals contributed to the injury of which she is complaining.

. . . . . .

"Where the signals are not given as in the manner provided by statute, and an injury occurs at the crossing of railroad and public highway, a presumption would arise that the failure to give the signals is the proximate cause of the injury. But such presumption would be rebuttable by evidence, and the jury should consider any and all evidence that may be in the case in determining the question of proximate cause. . . . the failure to give these signals raises that presumption, but it is rebuttable; it is not a conclusive presumption. That may be rebutted by the defendants by its [their] evidence, and as stated here, all the evidence must be considered in determining the question of proximate cause."

Immediately preceding the charge to the jury, the trial court, ruling upon the motion for a directed verdict, had quoted the words of this court in *Western & Atl. R. Co.* v. *Henderson,* 279 U. S. 639, 643, used in comparing the Georgia statute there under consideration with the Mississippi statute considered in *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35:

"Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. [citing cases] That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate."

And the effect of the ruling of the trial court is that the South Carolina statute was comparable with that of Mis-

sissippi and not with that of Georgia. It must be supposed that the court, with this in mind, intended to charge the jury in accordance with the language which it had just quoted. True, the jury was not told in so many words that where countervailing evidence had been put in the presumption comes to an end, but we think this is the fair purport of the language of the court to the effect that appellants may rebut the presumption by their evidence, and that then all the evidence must be considered in determining the question of proximate cause. Certainly, the charge contains no affirmative words directing the jury in that event to consider the presumption as evidence to be weighed with other evidence in the case. Under these circumstances, a request for a more explicit instruction in exact accord with what had just been read as to the Mississippi statute undoubtedly would have been granted; but that request was not made. Instructions are entitled to a reasonable interpretation, and are not generally to be regarded as the subject of error on account of not being sufficiently definite, if omissions complained of are not at the time pointed out by the excepting party. *Castle* v. *Bullard,* 23 How. 172, 189–190; *First Unitarian Society* v. *Faulkner,* 91 U. S. 415, 423; *Tweed's Case,* 16 Wall. 504, 515–516; *Locke* v. *United States,* 2 Cliff. 574, 15 Fed. Cas. 740, 742 (No. 8,442).

A reading of its opinion leaves no doubt that the state supreme court construed the statute as creating a presumption limited by the rule of the *Turnipseed* case, *supra* (at p. 43), and considered the charge of the trial court as in harmony with that view—namely, that the legal effect of the presumption was to cast upon the railroad company the duty of producing some evidence to the contrary, whereupon the inference was at an end, and the question became one for the jury upon all of the evidence. Appellants' contention that the presumption

fell within the principle laid down as to the Georgia statute in the *Henderson* case, *supra*, was rejected, and the court said that no decision brought to its attention sustained "the characterization of the disputable presumption arising under the crossing statute to the effect that it remains 'throughout the entire case' and is to be weighed as opposing evidence in fixing liability."

The Georgia statute involved in the *Henderson* case was of an entirely different character. As construed by the Georgia court, it not only permitted the presumption of negligence to be given the effect of evidence to be weighed against opposing testimony and to prevail unless such testimony was found by the jury to preponderate, but it was fundamentally arbitrary, in that the mere fact of collision between a railway train and a vehicle at a highway grade crossing created a presumption that the accident was caused by the negligence of the company. The mere fact of such a collision, we said, "furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone. Reasoning does not lead from the occurrence back to its cause." Moreover, the presumption was invoked to support *conflicting* allegations of negligence. Our decision in that case appropriately might have been cited here if we were considering a statute construed to mean that mere proof of collision at a crossing creates a presumption that the bell was not rung or the whistle sounded. But the rational connection between the fact proved and the fact inferred is plain enough when the proposition is put conversely, namely, that proof of failure on the part of the railroad to give the statutory signals raises a presumption that such failure is the proximate cause of the injury.*

* In addition to the *Turnipseed* case, see *Bailey* v. *Alabama*, 219 U. S. 219, 238; *Luria* v. *United States*, 231 U. S. 9, 25; *Yee Hem* v. *United States*, 268 U. S. 178, 183.

It follows that the statutory presumption as construed by the court below is free from constitutional infirmity under the due process clause.

The objection that because the presumption applies only to railway companies, its effect is to deprive appellants of the equal protection of the laws is clearly untenable. *Atlantic Coast Line* v. *Georgia,* 234 U. S. 280, 289; *Kansas City Southern Ry. Co.* v. *Anderson,* 233 U. S. 325, 330; *Seaboard Air Line* v. *Seegers,* 207 U. S. 73, 76; *Mobile, J. & K. C. R. Co.* v. *Turnipseed, supra; Missouri Pacific Ry. Co.* v. *Mackey,* 127 U. S. 205, 209. There is even less ground for the final contention that the statutory presumption under consideration violates the interstate commerce clause of the federal Constitution. Upon that point we are satisfied with what was said by the court below upon the authority, among other cases, of *Atlantic Coast Line* v. *Georgia, supra,* at p. 290, and *Southern Ry. Co.* v. *King,* 217 U. S. 524, 531–533.

Judgment affirmed.

GUARANTY TRUST CO., EXECUTOR, v. BLODGETT, TAX COMMISSIONER.

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

No. 217. Argued December 15, 1932.—Decided January 9, 1933.

1. Where it is claimed that a state statute imposing a tax has been applied by the state supreme court to an earlier contract in violation of the contract impairment clause of the Constitution, the opinion of that court definitely sustaining the tax on another statute antedating the contract must be accepted, in the absence of convincing reasons to the contrary. P. 512.
2. The contract clause not being involved, a construction placed upon a state statute by the state supreme court binds this Court as fully as if expressed in the statute itself in specific words. P. 513.

3. Where property is conveyed irrevocably in trust to pay the income to the grantor during life and thereafter to another beneficiary, the shifting of possession or enjoyment on the grantor's death is an event "generated" by the death upon which the State constitutionally may impose a succession tax. P. 513.

114 Conn. 207; 158 Atl. 245, affirmed.

APPEAL from a judgment entered in the Superior Court of Connecticut on advice sent down from the Supreme Court of Errors in response to questions of law reserved for its decision. The case first came into the Superior Court by appeal of the Tax Commissioner from a decree of the Probate Court for the District of Greenwich holding the succession in question non-taxable.

Mr. Gregory Hankin for appellant.

The trust deed was a contract which vested the grantor and the beneficiaries with definite rights as of the date of the transfer.

In previous cases this Court has held that an irrevocable trust operated to fix the rights to the property as of the time of the transfer, not as of the time of the decedent's death,—this irrespective of whether the tax was imposed on the right to transmit or on the right to receive.

While the court below expressly held that the tax was governed by the statute in force at the time of the transfer, it actually gave effect to a statute enacted after the transfer.

This Court will give independent consideration to the question whether there was a contract, what was its nature and effect and whether any obligations thereunder have been impaired.

The imposition of the tax had to proceed on the assumption that the property which had already been transferred *inter vivos,* four years before death, continued to remain in the decedent until her death, thus impairing the rights and obligations under the contract.

Even if the court below gave effect to the 1923 statute, the tax was without due process. Property transferred during lifetime through an irrevocable trust is not subject to death duties, unless made in contemplation of death. This transfer, it is stipulated, was not made in contemplation of death.

The tax is not sustainable as a property tax, because the property was without the taxing jurisdiction of the State of Connecticut; nor as a gift tax, because the basis was the value of the property at the decedent's death, not as of the time when the gift was made.

The tax as applied violated the equal protection clause.

Mr. Farwell Knapp, Assistant Tax Commissioner, with whom *Mr. Ernest L. Averill* was on the brief, for appellee.

Mr. Justice Sutherland delivered the opinion of the Court.

The Connecticut succession tax act of 1923 contains the following provision:

"All property and any interest therein owned by a resident of this state at the time of his decease, . . . which shall pass by will or inheritance under the laws of this state; and all gifts of such property by deed, grant or other conveyance, made in contemplation of the death of the grantor or donor, or intended to take effect in possession or enjoyment at or after the death of such grantor or donor, shall be subject to the tax herein prescribed." Chap. 190, Pub. Acts, 1923, § 1.

On December 28, 1926, while this act was in force, Harriet D. Sewell executed an irrevocable deed of trust to appellant, transferring certain securities, by which deed it was provided that the trustee collect the income and pay it to Mrs. Sewell during her life. Thereafter, the income was to be paid to her husband for his life, and upon his death the trustee was directed to pay and transfer the

principal of the trust absolutely to their daughter if she survived, but if not, then to the issue of the daughter, with a gift over in default of such issue. Mrs. Sewell died May 20, 1930, domiciled in Connecticut.

The state supreme court held that the statute recognized the distinction between taking effect in possession or enjoyment and vesting in right, title or interest, and intended to reach a shifting of the enjoyment of property although such shifting followed necessarily from a prior transfer of title *inter vivos;* that within the meaning and description of the statute, the transfer in question was a gift intended to take effect in possession or enjoyment at or after the death of the donor, and, therefore, was subject to the succession tax; and that the imposition of such tax did not offend against the Fourteenth Amendment or any other provision of the federal Constitution. 114 Conn. 207; 158 Atl. 245.

Appellant first contends that while the court below expressly upheld the tax under the act of 1923, it nevertheless gave effect to the later and more specific act of 1929 (Pub. Acts, c. 299, §§ 1 and 2), and thereby the contract impairment clause of the federal Constitution was infringed. This contention must be rejected. We are not at liberty to disregard the explicit holding of the state court as to the basis of its decision, except for convincing reasons, which here we are unable to find. Compare *Columbia Ry.* v. *South Carolina,* 261 U. S. 236, 245–247. The entire effort of the court upon this point plainly was directed towards sustaining the view that the event sought to be taxed fell within the provisions of the act of 1923. There is a reference to the act of 1929, but the decision is definitely put upon the act of 1923, and is supported by considerations of such weight as to leave no occasion for dependence upon the later act; and the supposition that in fact effect was given to it is without warrant.

Since the court below construed the act of 1923, without regard to the act of 1929, as embracing the event sought to be taxed, and since in that view the question of contract impairment does not arise, we are bound by the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co., ante,* p. 358; *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32.

In that view the tax was imposed upon an event generated by the death of the decedent. That such a tax does not conflict with any provision of the federal Constitution is clearly stated by this court in *Coolidge* v. *Long,* 282 U. S. 582, 596. There a similar tax was held bad because the state statute imposing it was passed after the creation of the trusts; but the court said: "Undoubtedly the State has power to lay such an excise upon property so passing after the taking effect of the taxing Act." While, strictly, that statement was not necessary to the decision, we follow it as expressing the settled conviction of this court, and, so far as the federal Constitution is concerned, sustain the validity of the act of 1923 as construed by the state court.

Judgment affirmed.

AMERICAN SURETY COMPANY OF NEW YORK *v.* MAROTTA.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 131. Argued December 8, 1932.—Decided January 9, 1933.

1. In § 1 (9) of the Bankruptcy Act, which declares that "creditor" shall "include" anyone owning a claim provable in bankruptcy, "include" is a word of extension or enlargement, not of limitation. P. 516.

2. In § 3a (1) of the Bankruptcy Act, by which a conveyance with intent to hinder, delay or defraud creditors is declared an act of bankruptcy, the word "creditors" has the meaning usually attributed to it when used in the common law definition of fraudulent conveyances. P. 518.
3. Under the common law rule, and the Bankruptcy Act, a creditor having only a contingent claim is protected against fraudulent conveyance. P. 518.

   So *held* of a surety company's claim to be indemnified against a liability that arose before the indemnitor transferred his property, and was paid off by the surety afterwards.
4. Where the Circuit Court of Appeals reversed upon an erroneous construction of a statute, without disposing of other questions presented to it, its decree was reversed and the case remanded to it for further proceedings. P. 518.

57 F. (2d) 829, reversed.

CERTIORARI [1] to review the reversal of an adjudication of bankruptcy.

Mr. Harry LeBaron Sampson for petitioner.

Mr. George I. Cohen submitted for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

July 16, 1930, petitioner claiming to be a creditor of respondent in an amount exceeding $7,000 filed a petition in bankruptcy against her in the United States district court for Massachusetts. It is alleged that on March 18, 1930, she conveyed her property with intent to hinder, delay and defraud her creditors including the petitioner and that she was insolvent. Respondent's answer denied that she committed the alleged act of bankruptcy or was insolvent or that petitioner was a creditor or had a provable claim against her. The court heard the case on evidence taken by, and the report of, a special master, made findings of fact and adjudged respondent a bank-

[1] See Table of Cases Reported in this volume.

rupt. The Circuit Court of Appeals reversed. 57 F. (2d) 829.

The substance of the findings, so far as material to our decision, may be briefly stated:

Under date of April 18, 1927, one Mogliani as principal and petitioner as surety executed a bond for $15,000 to the treasurer of the Commonwealth of Massachusetts to secure, among other things, the payment of any judgment that might be obtained in an action against the principal for injury resulting to any person by reason of the discharge of fireworks by him at a public exhibition. The bond was made and delivered pursuant to Massachusetts G. L., 1921, c. 148, § 57 C, D. Acts, 1921, c. 500. Petitioner became surety in accordance with an application executed by respondent and in reliance upon her agreement to indemnify it against every claim or liability arising on the bond. The application and agreement were accompanied by a financial statement made by her showing that in addition to considerable cash she owned several pieces of real estate worth much more than the amount of the bond. September 26, 1927, one Beatrice Ricci was injured by fireworks discharged at a public exhibition under the direction of Mogliani. She sued him for damages and, March 4, 1930, got a verdict for $10,000. March 18 respondent conveyed all her real estate to one Muollo, and on the same day he mortgaged a part of it and quit-claimed all to her husband to be held by the latter in trust for the benefit of their children. These conveyances covered all respondent's property and were made without consideration and with specific intent on her part to hinder, delay and defraud the petitioner, her only creditor. The verdict having been reduced, judgment was entered April 10, 1930, in favor of Ricci and against Mogliani for $6,650.48. Unable to collect from him, she demanded payment from

petitioner. And April 18, 1930, conformably to the statute, a suit on the bond was brought against petitioner to recover for her the amount of the judgment. Some time before it filed the petition in bankruptcy petitioner paid to her attorney the sum claimed and judgment was entered against it for that amount.

The Circuit Court of Appeals sustained respondent's contention that to constitute an act of bankruptcy, a fraudulent transfer must hinder, delay or defraud a creditor holding a claim provable at the time of such conveyance, and held that petitioner's claim against respondent was contingent and not provable until the entry of the judgment against Mogliani, and that therefore respondent committed no act of bankruptcy. And it directed the district court to dismiss the petition.

Unless required by the Act, the meaning of the word "creditors" as used in § 3a (1) is not to be restricted to those whose claims are provable at the time of the fraudulent conveyance.

Section 1 declares: "The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: . . . (9) 'creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy." 11 U. S. C., § 1. And § 3a contains the following: "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them." 11 U. S. C., § 21a. The decision below shows that at common law the word "creditors" has a broader meaning. But the court construed the definition of creditor, § 1 (9), to be comprehensive and the word "include" to be one of limitation, the equivalent of "include only," and to exclude every person not having a demand pres-

ently provable. Its ruling that respondent's transfer of her property to defraud petitioner was not an act of bankruptcy rests upon that construction.

In definitive provisions of statutes and other writings, "include" is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration. *Fraser* v. *Bentel,* 161 Cal. 390, 394; 119 Pac. 509. *People ex rel. Estate of Woolworth* v. *State Tax Commn.,* 200 App. Div. 287, 289; 192 N. Y. S. 772. *Matter of Goetz,* 71 App. Div. 272, 275; 75 N. Y. S. 750. *Calhoun* v. *Memphis & P. R. Co.,* Fed. Cas. No. 2,309. *Cooper* v. *Stinson,* 5 Minn. 522. Subject to the effect properly to be given to context, § 1 prescribes the constructions to be put upon various words and phrases used in the Act. Some of the definitive clauses commence with "shall include," others with "shall mean." The former is used in eighteen instances and the latter in nine instances, and in two both are used. When the section as a whole is regarded, it is evident that these verbs are not used synonymously or loosely but with discrimination and a purpose to give to each a meaning not attributable to the other. It is obvious that, in some instances at least, "shall include" is used without implication that any exclusion is intended. Subsections (6) and (7), in each of which both verbs are employed, illustrate the use of "shall mean" to enumerate and restrict and of "shall include" to enlarge and extend. Subsection (17) declares "oath" shall include affirmation. Subsection (19) declares "persons" shall include corporations, officers, partnerships, and women. Men are not mentioned. In these instances the verb is used to expand, not to restrict. It is plain that "shall include" as used in subsection (9) when taken in connection with other parts of the section cannot reasonably be read to be the equivalent of "shall mean" or "shall include only."

There being nothing to indicate any other purpose, Congress must be deemed to have intended that in § 3a (1) "creditors" should be given the meaning usually attributed to it when used in the common law definition of fraudulent conveyances. See *Coder* v. *Arts*, 213 U. S. 223, 242. *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. 701, 703. *Githens* v. *Shiffler*, 112 Fed. 505. Under the common law rule a creditor having only a contingent claim, such as was that of the petitioner at the time respondent made the transfer in question, is protected against fraudulent conveyance. And petitioner, from the time that it became surety on Mogliani's bond, was entitled as a creditor under the agreement to invoke that rule. *Yeend* v. *Weeks*, 104 Ala. 331, 341; 16 So. 165. *Whitehouse* v. *Bolster*, 95 Me. 458; 50 Atl. 240. *Mowry* v. *Reed*, 187 Mass. 174, 177; 72 N. E. 936. *Stone* v. *Myers*, 9 Minn. 303. *Cook* v. *Johnson*, 12 N. J. Eq. 51. *American Surety Co.* v. *Hattrem*, 138 Ore. 358, 364; 3 P. (2d) 1109. *U. S. Fidelity & Guaranty Co.* v. *Centropolis Bank*, 17 F. (2d) 913, 916. *Thomson* v. *Crane*, 73 Fed. 327, 331.

As the Circuit Court of Appeals, upon constructions of §§ 1 (9) and 3a (1) which we hold erroneous, disposed of the case without deciding other questions there raised, the decree will be reversed and the case will be remanded to that court for further consideration and proceedings in harmony with this opinion.

Reversed and remanded.

POBRESLO *v.* JOSEPH M. BOYD CO. ET AL.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 171. Argued December 13, 1932.—Decided January 9, 1933.

1. Voluntary assignments for the benefit of creditors are not inconsistent with the purposes of the federal Bankruptcy Act, though

subject to be set aside under it by timely petition of creditors. P. 526.

2. Statutory provisions in Wisconsin regulating voluntary assignments for the ratable benefit of all creditors of the assignor, and forbidding that any creditor gain priority by attachment or garnishment, but not providing for discharge of the assignor or requiring his release by creditors who would participate in the distribution,—held not in conflict with the Bankruptcy Act. *International Shoe Co.* v. *Pinkus*, 278 U. S. 261, distinguished. Pp. 523–525.

210 Wis. 20; 242 N. W. 725, affirmed.

APPEAL from a judgment upholding an assignment for the benefit of creditors and directing the dismissal of a garnishment proceeding brought by a non-assenting creditor.

Mr. C. G. Mathys, with whom *Mr. R. M. Rieser* was on the brief, for appellant.

The Wisconsin law should be considered in the light of the fact that when it was enacted there was no Bankruptcy Act and hence no conflict. It was clearly a bankruptcy law then, and nothing has happened since to change its character.

The early history of bankruptcy legislation demonstrates that discharge is not a necessary part of a bankruptcy law. Remington, Bankruptcy, 3d ed., p. 1, introduction.

The early Roman law impounded the debtor's property, provided for its equitable distribution among creditors, imposed penalties for fraud on the debtor's part, but contained no provision for discharge. Radin, Handbook of Roman Law, p. 314. The first English bankruptcy act contained no provision for discharge (34 Henry VIII, 1542); in fact it expressly forbade discharge. Queen Anne's Act of 1705 contained the first provision for discharge, conditioned upon the consent of a large proportion of creditors. The state of the law on bankruptcy in Eng-

land at the time of the Revolution is set forth in Blackstone's Commentaries, Book II, c. XXXI.

The meaning of the constitutional grant of power given to Congress under Art. I, § 8 of the Constitution, must be viewed in the light of the English bankruptcy history. *Sexton* v. *Dreyfus,* 219 U. S. 339, 344.

The first national bankruptcy law, passed in 1800, applied only to traders, merchants and brokers. Discharge could not be had without the written consent of two-thirds in number and value of all creditors. 2 Stat. 19. See *Sturges* v. *Crowninshield,* 4 Wheat. 122, 194.

The main purpose of a bankruptcy law is the equitable distribution of the insolvent estate among all creditors. If a state law accomplishes that purpose, it is suspended by the Bankruptcy Act. *In re Klein,* 1 How. 277, 280; *Hanover Bank* v. *Moyses,* 186 U. S. 181, 186; Remington, Bankruptcy, § 2110; Levinthal, 66 Pa. L. Rev. 223; Olmstead, "Bankruptcy, A Commercial Regulation," 15 Harv. L. Rev., 829, "Its main objects are administration and distribution, rather than relief of the debtor." *In re Leslie,* 119 Fed. 406, 410; *Pope* v. *Title Guaranty Co.,* 152 Wis. 611, 614.

This Court has held distribution to be the primary character of a bankruptcy law. *International Shoe Co.* v. *Pinkus,* 278 U. S. 261; *Straton* v. *New,* 283 U. S. 318; *In re Watts,* 190 U. S. 1. The lower federal courts have held that discharge is not an essential element. *In re Weedman Stave Co.,* 199 Fed. 948; *In re Smith,* 92 Fed. 135; *In re Salmon,* 143 Fed. 395; *In re F. A. Hall Co.,* 121 Fed. 992; *In re Storck Lumber Co.,* 114 Fed. 360.

In the case of a corporation the discharge is a negligible feature. *In re Merchants Ins. Co.,* Fed. Cas. No. 9,441; *Exploration Mercantile Co.* v. *Pacific Hdw. Co.,* 177 Fed. 825, 828; *In re F. A. Hall,* 121 Fed. 992, 997. The Bankruptcy Act expressly prohibits discharge to certain debtors. Congress by making an assignment an act of bank-

ruptcy has clearly indicated its intention that assignments for creditors should be administered in the federal court. *In re Curtis,* 91 Fed. 737, 740; *In re Gutwillig,* 90 Fed. 475, 477.

Uniformity, the fundamental aim of the constitutional grant of power to Congress with respect to bankruptcies, would be wholly destroyed by the enforcement of conflicting systems such as that set up by the Wisconsin statutes.

In order to invalidate an assignment made under the state law, it is not necessary that bankruptcy intervene. A single creditor who can not invoke the Bankruptcy Act may disregard the assignment in garnishment proceedings.

Mr. Frank A. Ross, with whom *Mr. William R. Bagley* was on the brief, for appellees.

Messrs. John W. Reynolds, Attorney General, and *Harold M. Wilkie,* by leave of Court, filed a brief on behalf of the State of Wisconsin, as *amicus curiae.*

Mr. Justice Butler delivered the opinion of the Court.

Chapter 128 of the Wisconsin Statutes, 1929, regulates and controls voluntary assignments for the benefit of creditors and also contains provisions relating to the discharge of insolvent debtors. By this appeal we are called on to decide whether as construed below the provisions of that chapter which relate to voluntary assignments for the benefit of creditors, and especially a clause contained in § 128.06, conflict with the National Bankruptcy Act. The clause declares: "No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being

for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void".*

* Section 128.06 follows.

"All voluntary assignments or transfers whatever . . . for the benefit of or in trust for creditors shall be void as against the creditors of the person making the same unless the assignee shall be a resident of this state and shall, before taking possession of the property assigned and before taking upon himself any trust conferred upon him by the instrument of assignment, deliver to the county judge or court commissioner of the county in which such assignor or some one of the assignors at the time of the execution of such assignment shall reside . . . a bond . . . in a sum not less than the present value of the assets of such assignor, . . . with two or more sufficient sureties . . .; and the bond shall be conditioned that such assignee shall faithfully discharge the several trusts reposed in him by such assignment and diligently and faithfully collect and reduce to money the property assigned to him and account for and pay over to the several parties, then being creditors of the assignor, all moneys that shall come into his hands from the effects of such assignor after deducting the necessary expenses of performing the several trusts mentioned in the assignment, as settled and allowed by the circuit court, and abide the order of said court. But no assignment shall be void because of any defect, informality or mistake therein or in the bond, inventory or list of creditors accompanying the same; and the court or judge may direct the amendment of the assignment or of any other such paper to effect the intention of the assignor or assignee, and any such amendment shall relate back to the time of the execution of the paper to which it is made. No mistake in filing a copy instead of an original or any like mistake or inadvertent failure to comply with the provisions of this chapter shall avoid the assignment. No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void; but in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all his creditors under the direction of the court by the assignee or by any receiver of said property and estate appointed as hereinafter provided."

The Boyd Company, a Wisconsin corporation, March 23, 1931, made a voluntary assignment of all its property to assignees for the benefit of its creditors. They immediately took possession, and the circuit court of Dane county on the same day assumed jurisdiction declaring in its order that it did so pursuant to c. 128. Appellant, a non-assenting creditor, brought suit against the assignor and prayed judgment for more than $2,500. September 1, 1931, she instituted garnishment proceedings against the assignees, asserting that the assignment was void because of failure to comply with c. 128 in several particulars and because that chapter was repugnant to the Bankruptcy Act. Thereafter the assignor amended the assignment to authorize the judge of the circuit court, in case of resignation of the assignees, to appoint a trustee. The assignees resigned, and the court appointed appellee Samp as sole trustee. He answered the garnishment and admitted that he had the property conveyed by the assignment but denied that he had possession or control of any property in which the assignor had an interest. Appellant, having recovered judgment against the assignor for $2,645, moved for judgment against the garnishees. The court found that the assignees had received property belonging to the assignor in excess of appellant's judgment and had transferred the same to the trustee, and ordered that it be applied to satisfy the judgment. The supreme court reversed and directed that the garnishee action be dismissed. 210 Wis. 20; 242 N. W. 725.

In view of the construction theretofore put upon c. 128 by the state supreme court, it is evident that the assignment did not have the effect of instituting proceedings contemplating discharge of assignor from its debts.

In *Voluntary Assignment of Tarnowski* (1926), 191 Wis. 279; 210 N. W. 836, the supreme court declared that, as to all matters comprehended within the Bank-

ruptcy Act, the state insolvency laws had been by it completely superseded and said (p. 283): "The statutes of this state relating to the subject of bankruptcy are suspended during the existence of the federal Bankruptcy Act, and . . . such statutes afford the courts of this state no power or authority to discharge debtors from their debts." In *Hazelwood* v. *Olinger Building Department Stores* (1931), 205 Wis. 85; 236 N. W. 591, the court pointed out that the Wisconsin statute under consideration is essentially different from the Arkansas statute before us in *International Shoe Co.* v. *Pinkus*, 278 U. S. 261, and, speaking through Chief Justice Rosenberry, said (p. 88): "In the matter of *Voluntary Assignment of Tarnowski* . . . it was held that the right to make a voluntary assignment for the benefit of creditors is a personal right inherent in the ownership of property, and existed at common law independent of the statute; that, while the discharge of a bankrupt from his debts constitutes the very essence of the Bankruptcy Law, the discharge of a debtor is no part of an assignment law; that part of the chapter relating to discharge is entirely superseded by the federal act, and has, under present conditions, no efficacy; and, further, that a creditor filing his claim and accepting his pro rata share of the proceeds under a voluntary assignment does not waive his right to object to the debtor's discharge. As a condition of filing a claim under the Arkansas statute, the creditor was required to agree that payment of a pro rata share of the assets of the insolvent's estate should discharge his claim. It is hardly necessary to point out the wide difference between the statute of Arkansas and that of Wisconsin as construed by this court." In the case at bar the court again declared that the provisions in c. 128 that apply to such voluntary assignments are severable from those that relate to the discharge of insolvent debtors. It reiterated that the federal

Act superseded the latter. And it held that, as there was an attempt to make an assignment for the benefit of creditors, the quoted clause of § 128.06 prevented garnishment, even though the assignees had failed to follow some of the procedural details prescribed by c. 128.

There is slight need to refer more specifically to the differences between this case and *International Shoe Co.* v. *Pinkus, supra.* There the proceedings in the chancery court were under the state insolvency law (Crawford & Moses' Dig., §§ 5885–5893) and not under the law governing voluntary assignments for the benefit of creditors. *Id.*, §§ 486–493. Upon the entry of the shoe company's judgment against him, Pinkus sought discharge from his debts under the insolvency law and to that end procured the entry of a decree under which his creditors were prohibited from having any payment out of his property except upon stipulation for his full release. As shown by our decision in that case, the Arkansas insolvency law not only related to the subject of bankruptcies but actually dealt with essential features of that subject which are covered by the Act now in force. It not only governed discharge of the bankrupt debtor but imposed conditions which trammeled and made against equal distribution of his property.

In the case now before us the Wisconsin statutory provisions relating to discharge of insolvent debtors were not invoked. There is nothing in the assignment, the application to the circuit court to take jurisdiction, or its order thereon, to suggest that the discharge of the assignor was contemplated. The provisions regulating the administration of trusts created by voluntary assignments for the benefit of creditors apply whether the assignor is solvent or insolvent. They do not prevent creditors from bringing action against the debtor or require those seeking to participate in the distribution of the estate to stipu-

late for his discharge. And, quite in harmony with the purposes of the federal Act, the provisions of c. 128 that are regulatory of such voluntary assignments serve to protect creditors against each other and go to assure equality of distribution unaffected by any requirement or condition in respect of discharge.

A proceeding under the Arkansas law derives its force solely from legislation that involves a judicial winding up of an insolvent estate and the discharge of the debtor. Such a law is within the field of the federal Act. Indeed, the declaration: "Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it" (30 Stat. 566) suggests that Congress intended to supersede these local enactments. See *In re Sievers,* 91 Fed. 366. *Star* v. *Johnson* (Tex. Civ. App.), 44 S. W. (2d) 429. On the other hand the Wisconsin law merely governs the administration of trusts created by deeds like that in question, which do not differ substantially from those arising under common law assignments for the benefit of creditors. The substantive rights under such assignments depend upon contract; the legislation merely governs the execution of the trusts on which the property is conveyed. And as proceedings under any such assignment may be terminated upon petition of creditors filed within the time and in the manner prescribed by the federal Act (*West Company* v. *Lea,* 174 U. S. 590), it is apparent that Congress intended that such voluntary assignments, unless so put aside, should be regarded as not inconsistent with the purposes of the federal Act. *Mayer* v. *Hellman,* 91 U. S. 496, 501. *Boese* v. *King,* 108 U. S. 379, 385–387. *Stellwagen* v. *Clum,* 245 U. S. 605, 615. *Straton* v. *New,* 283 U. S. 318, 327. It follows that the above quoted provision of § 128.06 is valid and effective to prevent garnishment of funds in the hands of the trustee.

Judgment affirmed.

JOHNSON ET AL. *v.* STAR.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 282. Argued December 13, 1932.—Decided January 9, 1933.

Statutory provisions in Texas governing assignments for the benefit of creditors, *held* consistent with the Bankruptcy Act, upon the authority of *Pobreslo* v. *Joseph M. Boyd Co., ante,* p. 518. P. 528. 47 S. W. (2d) 608, affirmed.

APPEAL from a judgment of the Supreme Court of Texas, which denied a writ of error to the Court of Civil Appeals, 44 S. W. (2d) 429, but approved the opinion of that court holding a garnishment invalid under the state law governing assignments for the benefit of creditors.

Mr. Spearman Webb submitted for appellants.

Mr. Wm. Andress, Jr., with whom *Mr. Lee Gammage Carter* was on the brief, for appellee.

Mr. JUSTICE BUTLER delivered the opinion of the Court.

Prior to March 13, 1931, appellants obtained a judgment for $113.20 against the Dallas Showcase & Manufacturing Company. On that day the latter, being insolvent and having unsecured indebtedness of about $11,000, made to appellee a voluntary assignment of all its property for the benefit of its creditors. Appellants refused to accept under the assignment and brought garnishment proceedings in justice court against the appellee. He answered that as such assignee, acting under Title 12 of the Texas Revised Civil Statutes, 1925, he had converted the assigned property into cash and had $582.63 which, as he insisted, was not subject to garnishment. The justice of the peace held him liable. He appealed to the county court and there the case was submitted on an agreed statement showing the facts aforesaid. The court held the state law in conflict with the Bankruptcy

Act and that therefore the amount on hand was subject to garnishment. The court of civil appeals reversed, 44 S. W. (2d) 429, and the supreme court approving its opinion denied writ of error. 47 S. W. (2d) 608.

The sole question is whether, as construed by its highest court, articles 261–274 of Title 12 are repugnant to the Bankruptcy Act.

These provisions are derived from an Act of March 24, 1879, (Acts 1879, p. 57) as amended, Acts 1883, p. 46. Evidently, that statute was intended to take the place of the Bankruptcy Act of 1867, which was repealed in 1878. *Cunningham* v. *Norton,* 125 U. S. 77, 81. It established a complete system for the administration of property conveyed by insolvent debtors for the benefit of their creditors. *Tracy* v. *Tuffly,* 134 U. S. 206, 223. Every such assignment is required to provide for ratable distribution of the insolvent's estate among the consenting creditors and, whether or not so specified, is deemed sufficient to pass all the assignor's property to the assignee. Art. 261. "A debtor may make such assignment and shall thereupon stand discharged from all further liability to such consenting creditors. . . . Such debtor shall not be discharged from liability to such creditor who does not receive as much as one-third of the amount . . . . allowed in his favor. . . ." Art. 263. Non-assenting creditors take nothing under the assignment, art. 265, but may garnishee any excess remaining after full payment of consenting creditors and the expenses of executing the assignment. Art. 271.

"The statute in question is in no sense an insolvent law, providing for the discharge of a debtor by a compliance with its terms without the consent of the creditor; but is a statute which, for the better protection of creditors, prescribes a mode for the administration of the estates of insolvents under assignments made by the debtors themselves, which would be good at common law,

unaided by the statute, and, like any other trust, could be enforced in a court of equity in the absence of a statute providing a mode of administration." *Keating* v. *Vaughn,* (1884) 61 Tex. 518, 524. And see *Leon & H. Blum* v. *Welborne* (1882), 58 Tex. 157, 161. *McKee* v. *Coffin* (1886), 66 Tex. 304, 309; 1 S. W. 276. *Fant* v. *Elsbury* (1887), 68 Tex. 1, 5; 2 S. W. 866. And in a case arising after the passage of the present Bankruptcy Act, a lower court propounded the question whether this law was suspended by the Bankruptcy Act. The supreme court, after reference to *Boese* v. *King,* 108 U. S. 379, said: "The effect of the ruling [in that case] is that, in so far at least as an insolvent law of a State provides for a release by the creditors, it is suspended by a bankrupt law of the United States, but that if the assignment convey all the debtor's property subject to the payment of his debts for the equal benefit of all his creditors who may accept under it, it is otherwise valid, except as against proceedings seasonably taken under the bankrupt act." *Patty-Joiner & Eubank Co.* v. *Cummins* (1900), 93 Tex. 598, 604; 57 S. W. 566. And in a later case the court held that though the statute in so far as it makes provision for exacting releases should be held to be an insolvent law, and therefore suspended by the Bankruptcy Act, one who had accepted and received one-third of the amount of his claim under an assignment good at common law, though exacting such release, where no proceedings were had under the Bankruptcy Act, thereby discharged the debtor from liability. *Haijek & Simecek* v. *Luck* (1903), 96 Tex. 517; 74 S. W. 305.

In the case at bar the court of civil appeals for the fifth district observed the differences between state insolvency laws and those merely regulating voluntary assignments for the benefit of creditors and, following the rule established by the Texas supreme court that non-consenting creditors may not seize property covered by such assign-

ments, held that the fund in the hands of the assignee was not garnishable. And the supreme court, approving that decision and disapproving one to the contrary announced by the court of civil appeals for the sixth district, *Johnson* v. *Chapman Milling Co.*, 37 S. W. (2d) 776, held that " the questions at issue have been definitely settled by this court in the cases of " *Patty-Joiner & Eubank Co.* v. *Cummins, supra,* and *Haijek & Simecek* v. *Luck, supra.*

Accepting as we do that court's construction of the provisions in question, we are of opinion that they are not repugnant to the Bankruptcy Act. This case is ruled by our decision in *Pobreslo* v. *Joseph M. Boyd Co., ante,* p. 518. *Judgment affirmed.*

AETNA LIFE INSURANCE CO. ET AL. *v.* MOSES.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 137. Argued December 8, 1932.—Decided January 9, 1933.

1. Under the Longshoremen's and Harbor Workers' Compensation Act,—made applicable to the District of Columbia as a workmen's compensation law—where an employee is killed in the course of his employment by the negligence of a stranger, and the administratrix, being also the sole beneficiary, accepts compensation, there is an implied statutory assignment to the employer of her cause of action for the negligence under the District death statute. P. 537.
2. In such case the Compensation Act by implication gives the employer the same control over the institution of the death action, the compromise and settlement of the claim against the wrongdoer, and the disposition of the proceeds, as it gives where the injury results only in disability. P. 538.
3. Although the Compensation Act does not say that the action for wrongful death may be brought in the name of the employer, this is implied in its purpose to effect a complete transfer of the cause of action, notwithstanding that the common law rule against actions in the names of assignees of choses in action survives in the forum. P. 540.

4. An insurer under the Compensation Act, though required to pay an award directly, is nevertheless an indemnitor and, to the extent that it has paid, is entitled to be subrogated to the employer's right of recovery against third persons. P. 541.
5. The employer, being directed by the Act to distribute the proceeds, is the party to bring the action for wrongful death, and may show that it is for the use of the insurer and of the widow and administratrix, according to their beneficial interests. P. 542.
6. Whether under Equity Rule 13 of the Supreme Court of the District of Columbia, the insurer and the widow-administratrix may join in the action for wrongful death as legal plaintiffs, this Court does not decide,—it being a question of local practice. P. 543.

61 App. D. C. 74, 57 F. (2d) 440, reversed.

CERTIORARI * to review the affirmance of a judgment for the defendant in an action for wrongful death. The trial court struck the declaration for misjoinder of parties plaintiff, and entered judgment for the defendants when the plaintiffs elected to stand on the declaration.

Messrs. Charles W. Arth and *Leonard J. Ganse* for petitioners.

The employer's liability is only contingent. He can not sue in his own right. *Red Wing* v. *Eichinger,* 163 Minn. 54. Unless the insurer may enforce its claim, any action against the tort-feasor must fail.

The Compensation Act uses " carrier " and " employer " synonymously. The insurer is under a direct obligation to the injured employee. *American Mut. Liability Ins. Co.* v. *Patrick,* 157 Tenn. 618, 621. Its assumption of all liabilities and duties imposed on the employer implies corresponding rights. *Sarber* v. *Aetna Life Ins. Co.,* 23 F. (2d) 434, cert. den., 277 U. S. 577.

The right of action passing to the employer by statutory assignment under § 33-(b) likewise passed to the insurer by necessary implication when it paid the death benefit awarded.

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* See Table of Cases Reported in this volume.

As indemnitor, the insurer has a right of action against the negligent third person. *Travelers' Ins. Co.* v. *Great Lakes Engineering Works,* 184 Fed. 426; *Workmen's Compensation Exchange* v. *Chicago, M., St. P. & P. R. Co.,* 45 F. (2d) 885. It also took a right of action as conventional subrogee under the terms of the policy. *The Kokusai Kisen Kabushiki Kaisha,* 44 F. (2d) 659; *Globe Indemnity Co.* v. *Toye Bros. Auto Co.,* 14 La. App. 142.

The widow, having accepted the death benefit under the Act, may not maintain an action in her own name, although she has an interest as statutory *cestui que trust* in any excess of recovery had against defendant (*Hunt* v. *Bank Line,* 35 F. (2d) 136; *The Aden Maru,* 51 F. (2d) 599, 600); and the employer may not maintain an action in his own right because he has sustained no loss. *Red Wing* v. *Eichinger, supra.*

The Compensation Act, § 33, creates a new cause of action, makes complete provision for all of its purposes, and is not controlled or limited by the death statute in any respect. *Moore* v. *Christienson S. S. Co.,* 49 F. (2d) 807, affirmed, 53 F. (2d) 299; *Hyde* v. *Southern Ry. Co.,* 31 App. D. C. 466. See also *Smith's Dock Co.* v. *John Redhead & Sons,* (1912) 2 K. B. 323.

The Compensation Act and the death statute are inconsistent. Limitations of time are different; causes of action are different; beneficiaries are different; damages are different; and the distribution of damages is different.

The rules of the Supreme Court of the District of Columbia govern the form of action in this case and designate who must or may be made parties herein. These rules have the force of law. *Judd & Detweiler* v. *Gittings,* 43 App. D. C. 304, 311; *Murphy* v. *Gould,* 39 App. D. C. 363, 367. The insurer, and the widow, both personally and as administratrix, are the real parties in interest. The employer has a direct but contingent liability. He should sue as assignor to the use of the Insurance Company, his

assignee. See *McKenzie* v. *Missouri Stables,* 34 S. W. (2d) 136.

The technical niceties of pleading do not apply under compensation acts. *Clough & Molloy* v. *Shilling,* 149 Md. 189. For variation in the manner of pleading parties plaintiff in death actions similar to that here presented, see *Maryland Casualty Co.* v. *Union Bridge Co.,* 145 Md. 644; *State Accident Fund* v. *New York, P. & N. R. Co.,* 141 Md. 305; *Bethlehem Steel Co.* v. *Raymond Concrete Pile Co.,* 141 Md. 67; *Kaufman* v. *United Rys. & Elec. Co.,* 135 Md. 524.

Mr. H. Clay Espey, with whom *Messrs. Merritt U. Hayden* and *James O'D. Moran* were on the brief, for respondent.

The two legal plaintiffs are entitled to bring suit under any theory as assignees only.

The administrator or executor of the deceased is the only proper party plaintiff in an action in the District of Columbia against a third party whose negligence has caused the death of the deceased. *Fleming* v. *Capital Traction Co.,* 40 App. D. C. 489; *Ferguson* v. *Railroad Co.,* 6 App. D. C. 525. Dist.: *Hyde* v. *Southern Ry.,* 31 App. D. C. 466.

The Compensation Act was designed principally to afford an adjustment of the rights and obligations of employers and employees, principally the latter; it was not intended to disturb the liabilities of strangers to the employment. *Silvia* v. *Scotten,* 32 Del. 295, 299. It would be far-fetched to hold that in view of the inconsistencies, a new cause of action arises against a negligent stranger to the employment for the reimbursement of the employer and his insurance carrier, where there is absolutely no language in the Compensation Act creating such new cause of action.

If the Act creates such new cause of action, then the third person would be subjected to a double liability for such wrongful death: (1) under the Compensation Act; and (2) under "Lord Campbell's Act."

The employer and the insurer are not proper legal parties plaintiff in this action. The defendant's liability is entirely statutory, and therefore subject to the principle that statutes in derogation of the common law are to be strictly construed.

Although the Compensation Act assigns to the employer the right of the person entitled to compensation, it nowhere gives him express authority to bring a suit in his own name. An assignee may not sue in his own name without special statutory authority. *Glenn* v. *Marbury,* 145 U. S. 499; *Taylor* v. *Anderson,* 275 U. S. 431; *Metropolitan Coach Co.* v. *Freund,* 42 App. D. C. 283; *Commercial Nat'l Bank* v. *Consumers' Brewing Co.,* 16 App. D. C. 186; *Armstrong, Witworth & Co.* v. *Norton,* 15 App. D. C. 223.

The common law on this subject has been changed in the District of Columbia only to permit the assignee to sue in his own name where a judgment or certain contract actions are assigned. Unliquidated tort claims are unmentioned. This was done by Act of Congress of March 3, 1901, D. C. Code, c. 11, §§ 431–434.

The insurer is not a proper legal plaintiff. The Act makes no assignment to the insurer. The assignment by the subrogation clause in the policy would not permit the insurer to sue in its own name. *Glenn* v. *Marbury, supra.* Moreover an action for personal injuries is not assignable in the District. *Lamont* v. *Washington & Georgetown R. Co.,* 2 Mackey 502.

Even if a new cause of action is created by the Compensation Act, it is none the less a cause of action for death wrongfully caused by another and is not assignable.

Southern Pac. Co. v. *Winton,* 27 Tex. Civ. App. 503; *Marsh* v. *W. N. Y. & P. Ry. Co.,* 204 Pa. 229.

Neither the employer nor the insurer may be a proper legal plaintiff under District of Columbia Supreme Court Equity Rule No. 13. The rule merely states an established rule of equity practice, in force in the District before even assignees of contract claims could sue in their own names at law. *Young v. Kelly,* 3 App. D. C. 296. The statute permitting assignees of liquidated contract claims to sue in their own names (D. C. Code, 1924, c. 11, §§ 431–434), was not enacted until 1901. Before this statute was passed, it was definitely established that no assignee could sue in his own name at law. *Glenn* v. *Marbury, supra.* The Equity Rule was not intended for actions at law. To hold that all plaintiffs in the present case are properly joined by reason of Equity Rule No. 13 would be to revolutionize the practice in the District.

By the Act of 1901, assignees of judgments and of liquidated contract claims were expressly authorized to sue in their own name. By implication other types of claims were excluded. A rule of court can not repeal a statute or regulate a matter already regulated by statute. *Hamilton* v. *Fowler,* 83 Fed. 321, 326; *Schnitzer* v. *Stein,* 96 Ore. 343; *Nissen* v. *Flaherty,* 117 Me. 534. A rule of court can not be in contravention of the common law or the law as declared in numerous decisions of the court. *DeLorme* v. *Pease,* 19 Ga. 220, 227; *Huff* v. *Shepperd,* 58 Mo. 242, 246.

Wherever a state court permits an employer or insurance company to recover in its own name, the act makes provision accordingly. *Silvia* v. *Scotten, supra; Insurance Co.* v. *Railways,* 39 Cal. App. 388; *Henderson Tel. & Tel. Co.* v. *Owensboro Tel. & Tel. Co.,* 192 Ky. 322; *Texas & P. R. Co.* v. *Archer,* 203 S. W. 796; *Jordan* v. *Orcutt,* 181 N. E. 661.

The widow as an individual and the insurance company are not proper use plaintiffs. The administratrix is the only proper legal party plaintiff, and the employer may be the only proper use plaintiff. See *Luckey* v. *Union Pac. Ry. Co.*, 117 Neb. 85.

Mr. Justice Stone delivered the opinion of the Court.

Roberts, an employee of petitioner Bralove, was killed in the course of his employment, by the alleged negligence of respondent. His widow, who was also his administratrix, claimed and has accepted an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act (March 4, 1927, c. 509, 44 Stat. 1924), made applicable as a workmen's compensation law in the District of Columbia by Act of May 17, 1928, c. 612, 45 Stat. 600. The award directed the employer and petitioner, The Aetna Life Insurance Company, his insurer,[1] to pay compensation to the widow in periodic installments, and the expenses attendant upon the burial of the deceased.

The present suit was brought in the Supreme Court of the District of Columbia on the theory that the acceptance of compensation awarded under the statute operated as an assignment of the administratrix's right to pursue the respondent for damages for the wrongful death, and that the insurer succeeded to that right by subrogation. The declaration named as plaintiffs petitioner The Aetna Life Insurance Company, "in its own right and also to the

[1] Under the terms of the policy the insurer obligated itself to pay all installments of compensation directly to the person entitled to them "because of the obligation for compensation . . . imposed upon . . . this Employer," as well as to indemnify the employer against any loss by reason of his liability. The former provision is required by §§ 35 and 36 of the statute "in order that the liability for compensation imposed by this Act may be most effectively discharged by the employer, and in order that the administration of this Act in respect of such liability may be facilitated. . . ."

use of" the widow "in her own right and as administratrix," and petitioner Bralove "to the use of" the insurance company. Respondent moved to strike the declaration for misjoinder of parties plaintiff and causes of action. The trial court sustained the motion on the first ground, and, as petitioners elected to stand on the declaration, gave judgment for the respondent, which the Court of Appeals affirmed, 61 App. D. C. 74; 57 F. (2d) 440. This Court granted certiorari.

Both courts below ruled that the administratrix is, by the terms of the District death act (23 Stat. 307; D. C. Code [1924], §§ 1301, 1302, 1303), the only proper plaintiff in an action for wrongful death, and that the Compensation Act, though it assigns the cause of action for the death, to the employer, upon acceptance of the award, does not, under the common-law practice prevailing in the District, permit him to bring the suit in his own name. The trial court further expressed the view that the insurer was without any interest in the litigation, by way of subrogation, since the cause of action for wrongful death is not assignable at common law, and the Compensation Act confers on the insurer no rights analogous to those given the employer. The question before us is whether the Court of Appeals was right, and, if not, whether the proper parties have been designated as plaintiffs.

Sections 7, 8 and 9 of the Compensation Act provide for compensation to the employee if he is injured, or to certain of his dependents, if he is killed, in the course of his employment. Section 33 (a) provides that "if on account of a disability or death for which compensation is payable . . . the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect . . . to receive such compensation or to recover damages against such third person." By subsection (b) "Acceptance of such compen-

sation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person," and by subsection (d) the "employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person."

But the cause of action against a third party which is thus cast upon the employer is not to be maintained exclusively for his own benefit. From the proceeds of the litigation or compromise the employer is directed by § 33 (e) to retain an amount equal to his disbursements in securing them, the cost of benefits furnished by him to the employee, amounts paid as compensation, and the present value of all amounts which it is estimated are payable as such. The latter sum is to be held by the employer "as a trust fund to pay such compensation as it becomes due and to pay any sum in excess of such compensation to the person entitled to such compensation or to the representative." Any amount recovered above that required for these purposes is to be paid by the employer directly "to the person entitled to compensation or to the representative."

In the case where the employee survives and accepts compensation as the only person entitled, it is clear that the statutory assignment vests in the employer the full right to recover damages from the third person. Double recovery by the employee, compare *Mercer* v. *Ott*, 78 W. Va. 629; 89 S. E. 952; *Fox* v. *Dallas Hotel Co.*, 111 Tex. 461; 240 S. W. 517; is thus avoided. Yet the employer is permitted to share in the recovery only to the extent of his own liability, compare *Travelers Insurance Co.* v. *Brass Goods Mfg. Co.*, 239 N. Y. 273; 146 N. E. 377, and any excess goes to the injured employee.

In this case the injury resulted in death of the employee, and the election to take compensation was made by the widow. As she is both the administratrix and the only

person entitled to compensation, the election was validly exercised and we need not resolve possible doubts as to the proper person to make the election under other circumstances. Compare §§ 33 (a) and 33 (b) with § 33 (f). Her election has called into operation the statutory assignment so far as it applies to the action for wrongful death. We must decide its effect on that cause of action.

The statute is not free from ambiguity. The right to recover for a wrongful death is the creature, not of the common law, but of a statute which confers the right on the personal representative of the deceased for the benefit of his next of kin under the local statute of distribution, some of whom may not be entitled to compensation under the Compensation Act. Nevertheless, § 33 (b) of the Act provides that it is the "right of the person entitled to compensation to recover damages against such third person" which is assigned to the employer by the election to take compensation. Reading this provision literally and alone, the employer, in the case of the wrongful death of his employee, would take nothing by the assignment which it purports to effect, since the person entitled to the compensation has no right to recover for the death. But § 33 (d) authorizes the employer to institute suit or to compromise the claim, and §§ 33 (e) (1) (c) and 33 (e) (2) provide that any recovery in excess of the sums required to reimburse the employer and allow for compensation payable by him is to be paid to the representative of the deceased. Having regard to these provisions and to the general purpose which the act discloses with respect to rights of recovery when the injury does not result in death, we see no escape from the conclusion that the statute contemplates that the employer is to have the same control over the institution of an action for wrongful death, the compromise and settlement of the claim, and the distribution of the proceeds, as he is given in unambiguous language in the case where the injury results only

in disability. What is made explicit by the statute with respect to the latter is implicit with respect to the former. For if it had been intended that the employer should assert only a part of the action for wrongful death, proportionate to the interest of those who are dependents under the Compensation Act, compare *Matter of Zirpola* v. *Casselman*, 237 N. Y. 367; 143 N. E. 222; *U. S. Fidelity & Guaranty Co.* v. *Graham & Norton Co.*, 254 N. Y. 50; 171 N. E. 903, there would be no meaning to the language of § 33 (2) directing him to pay to the personal representative from the proceeds of the action any excess over the compensation award.

Concluding that where the employer is given anything to recover it is the full recovery provided by the wrongful death act, we do not think, as did the courts below, that the rights thus conferred may be enforced only by an action brought in the name of the personal representative. It is true that the statute does not expressly say that the employer may bring the action in his own name, and that by the common law the assignee must, in general, sue in the name of the assignor. *Glenn* v. *Marbury*, 145 U. S. 499. This rule, a vestige of the common law's reluctance to admit that a chose in action may be assigned, is today but a formality which has been widely abolished by legislation. We see no reason for thinking that a statute passed in 1928 and clearly intended to effect a complete transfer of the cause of action, should be interpreted to perpetuate that formality. There is nothing in its language, history or purpose to indicate that the word "assignment" was used as anything other than a convenient description of the transfer to the employer of the rights of the employee or his representative, or that it is to be read in the common law sense, merely because the forum for the enforcement of those rights has not departed from

the common law form in the case of voluntary assignments.

It is immaterial whether the statutory assignment is said to create a new cause of action in the employer or merely to permit him to enforce that previously vested in the employee or his personal representative. What is material is that the employer acquires the legal rights of the employee or the personal representative, subject to the qualifications imposed by the common law or the death statute to the extent that they are not inconsistent with the provisions of the Compensation Act. The Compensation Act permits him to enforce them in his own name.

We do not doubt, although other courts have, *Henderson Tel. & Tel. Co.* v. *Owensboro Home Tel. & Tel. Co.*, 192 Ky. 322; 233 S. W. 743; *Hartford Accident & Indemnity Co.* v. *Englander*, 93 N. J. Eq. 188; 118 Atl. 628, that the insurer is subrogated to the rights of the employer to the extent that it has discharged his duties, though whether its rights extend to compensation which it is liable to pay, as well as to that which it has paid, we need not decide.[2] Notwithstanding, the provision of the statute and of the policy permitting an award for compensation to be made against the insurer directly, the function of the insurer is essentially that of indemnifying the employer. The statute contemplates that the payment of compensa-

[2] The policy of insurance provides (Clause K) that "the Company shall be subrogated in case of any payment under this Policy, to the extent of such payment, to all rights of recovery therefor vested by law either in this Employer or, in any employee or his dependents claiming hereunder, against persons, corporations, associations or estates." The insurer is subrogated to the employer's rights to no greater extent under this express provision than it would be without it by operation of law; whether its rights may be limited by it, we have no occasion to consider.

tion should be secured by insurance, and nothing in it indicates that the insurer is to be denied an indemnitor's rights. Subrogation is a normal incident of indemnity insurance. *Hall & Long* v. *Railroad Companies*, 13 Wall. 367; *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 462; *St. Louis Iron Mountain & Southern Ry. Co.* v. *Commercial Union Insurance Co.*, 139 U. S. 223, 235; *Travelers Insurance Co.* v. *Great Lakes Engineering Co.*, 184 Fed. 426; *Workmen's Compensation Exchange* v. *Chicago, M., St. P. & P. R. Co.*, 45 F. (2d) 885.

The suggestion of the trial court that subrogation is precluded here by the non-assignability, under the death act and the common law, of the administratrix's cause of action for death, is without force. Considerations of policy which may forbid the voluntary assignment of the cause of action are obviously inapplicable to a case where the statute does assign the action to the employer in order to carry out the plan of the Compensation Act. That plan would be destroyed if the insurance company were denied the right of subrogation. For the consequence would be to permit that double recovery by either the employer or the next of kin entitled to compensation which the statute is careful to avoid, with a resulting increase in the cost of the insurance which the statute requires.

The insurer's right of subrogation does not alter the fact that it is the employer who is directed by the statute to distribute the proceeds of the recovery, in which the insurer has only a partial interest. Accordingly, the employer is the party to bring the action and the only necessary party plaintiff in the case before us.[3] But the insur-

[3] Under the common law practice rights acquired by subrogation were asserted in an action at law in the name of the insured to the insurer's use, *Hall & Long* v. *Railroad Companies*, 13 Wall. 367; *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474, though in equity, *Garrison* v. *Memphis Ins. Co.*, 19 How. 312, and admiralty,

ance company and the widow, both in her own right and as administratrix, are interested in the recovery. Under the common law practice, the defendant may not complain if the employer indicates their beneficial interests by bringing the action to their use as well as to his own. See *Southern Ry. Co.* v. *Carter,* 139 Ga. 236, 238; 77 S. E. 21; *Pearce* v. *Twichell,* 41 Miss. 344, 346; *Atkins* v. *Moore,* 82 Ill. 240, 241; compare *Roof* v. *Chattanooga Wood Split Pulley Co.,* 36 Fla. 284, 293; 18 So. 597. Whether, under Equity Rule 13 of the Supreme Court of the District of Columbia, made applicable to actions at law by the first paragraph of the law rules, they may join with him as legal plaintiffs since they have "an interest . . . in obtaining the relief demanded," we do not decide. The decision does not depend upon the federal statute, but upon the local rule, and may be conditioned by unwritten practices which we should hesitate to disturb. Nor do we consider what would be the rights of the person entitled to compensation or the personal representative, compare *Hunt* v. *Bank Line,* 35 F. (2d) 136; or the insurer, see *Norwich Insurance Co.* v. *Standard Oil Co.,* 59 Fed. 984; *Continental Insurance Co.* v. *Loud & Sons Lumber Co.,* 93 Mich. 139; 53 N. W. 394; *U. S. Fidelity & Guaranty*

Liverpool & Great Western Steam Co. v. *Phenix Insurance Co.,* 129 U. S. 397, 462, the insurer might sue in its own name. We need not consider the effect upon the common law rule of Equity Rule 13 of the Supreme Court of the District of Columbia (made applicable to actions at law by Law Rules, ¶ 1) providing that all actions "shall be prosecuted in the name of the real party in interest," in a case where the insurer succeeds by subrogation to the entire cause of action of the insured against the party primarily responsible for the loss. Cf. *Travelers Insurance Co.* v. *Great Lakes Engineering Co.,* 184 Fed. 426. Such was not the case here. Compare *Norwich Insurance Co.* v. *Standard Oil Co.,* 59 Fed. 984; *Continental Insurance Co.* v. *Loud & Sons Lumber Co.,* 93 Mich. 139; 53 N. W. 394; *U. S. Fidelity & Guaranty Co.* v. *Graham & Norton Co.,* 254 N. Y. 50. 54–55; 171 N. E. 903.

Co. v. *Graham & Norton Co., supra,* 54–55; 171 N. E. 903; compare *Ocean Accident & Guarantee Corp.* v. *Hooker Electrochemical Co.,* 240 N. Y. 37; 147 N. E. 351; *Aetna Casualty & Surety Co.* v. *Phoenix Nat. Bank & Trust Co.,* 285 U. S. 209, 214, in a case where the employer refused to coöperate in the prosecution of the action.

Since the ruling below that the action could only be brought in the name of the personal representative was erroneous, petitioners' failure to amend in conformity to that ruling will not preclude amendment now. Judgment will be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* ALUMINUM GOODS MANUFACTURING CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 192. Argued December 13, 14, 1932.—Decided January 9, 1933.

1. The purpose of requiring consolidated returns by affiliated corporations was to impose the war profits tax according to true net income and invested capital of what was, in practical effect, a single business enterprise, even though conducted by means of more than one corporation. P. 547.
2. Primarily, the consolidated return was to preclude reduction of the total tax payable by the business, viewed as a unit, by redistribution of income or capital among the component corporations by means of intercompany transactions. *Id.*
3. A manufacturing corporation bought all the shares of another corporation and used it as its subsidiary for selling the goods manufactured. The subsidiary, after netting losses in several years preceding 1917, was liquidated in that year, and in the year next following dissolved. *Held* that the two corporations did not cease to be "affiliated" during the year 1917 (Rev. Act 1921, § 1331; Treas. Reg. 41, Arts. 77 and 78); and that in making up their consolidated return of excess profits for that year, the loss of the

parent company's investment in the stock of the subsidiary, and the loss of moneys advanced by the one to the other for the business and not repaid, were properly deducted from gross income after subtracting from their sum the subsidiary's operating loss in that year. (Rev. Acts, 1916, § 12; 1917, § 206; Treas. Reg. 33, 1918 ed., Art. 147.) P. 548 *et seq.*

56 F. (2d) 568, affirmed.

CERTIORARI * to review the reversal of an order of the Board of Tax Appeals, 22 B. T. A. 1, sustaining the Commissioner's finding of a deficiency in a consolidated tax return.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *John MacC. Hudson* were on the brief, for petitioner.

Mr. Frederic Sammond, with whom *Messrs. Edwin S. Mack, Arthur W. Fairchild, J. Gilbert Hardgrove,* and *Paul F. Meyers* were on the brief, for respondent.

Mr. Ward Loveless, by leave of Court, filed a brief as *amicus curiae.*

MR. JUSTICE STONE delivered the opinion of the Court.

In 1914 respondent, a New Jersey manufacturing corporation, purchased all the capital stock of the Aluminum Sales and Manufacturing Company, a New York corporation. From that time until its liquidation, carried on in 1917, the Sales Company was principally engaged in selling goods manufactured by respondent. In February, 1918, it was dissolved. The operation of the Sales Company reflected net losses during the years 1914, 1915 and 1916, as well as in the year 1917. As a result of the operating losses and the liquidation of the Sales Company,

* See Table of Cases Reported in this volume.

respondent suffered the loss of certain sums advanced to the Sales Company, and of the total investment in its stock.

For 1917 the two corporations filed separate returns for computation of the normal income tax, and a consolidated return for the purposes of the excess profits tax. In its separate return respondent claimed, and the Commissioner allowed, deduction of an aggregate loss made up of respondent's advances to the Sales Company, and the cost of its stock, less the value of equipment and good will realized on its liquidation. This loss, reduced by the 1917 operating loss of the Sales Company, was deducted from gross income in the consolidated return. The Commissioner's refusal to allow the deduction was sustained by the Board of Tax Appeals, 22 B. T. A. 1, whose determination was reversed by the Court of Appeals for the Seventh Circuit, 56 F. (2d) 568. The Court of Appeals held that respondent's affiliation with the Sales Company was ended by the liquidation in 1917, so that the loss was suffered "outside the period of affiliation," and that in any case, as the loss did not result from an "intercompany" transaction, it could be deducted in the consolidated return. This Court granted certiorari, to resolve an alleged conflict with the decision of the Court of Claims in *Utica Knitting Co.* v. *United States,* 68 Ct. Cls. 77, and see *Autosales Corporation* v. *Commissioner,* 43 F. (2d) 931, 933.

Title II of the Revenue Act of 1917, 40 Stat. 300, 302, imposed a war excess profits tax in addition to the normal tax upon the income of corporations. The statute made no provision for consolidated returns by affiliated corporations, but Articles 77 and 78 of Treasury Regulations 41, adopted pursuant to the Act, did authorize the Commissioner to require affiliated corporations, including those, the stock of one of which was owned by another, to file a consolidated return of net income and invested capital. And § 1331 of the Revenue Act of 1921, 42 Stat. 227, 319,

provided that for the purpose of determining excess profits taxes the Revenue Act of 1917 "shall be construed to impose the taxes therein mentioned upon the basis of consolidated returns of net income and invested capital in the case of domestic corporations and domestic partnerships that were affiliated during the calendar year 1917." [1]

The purpose of requiring consolidated returns by affiliated corporations was, as the Government contends, to impose the war profits tax, according to true net income and invested capital of what was, in practical effect, a single business enterprise, even though conducted by means of more than one corporation. Primarily, the consolidated return was to preclude reduction of the total tax payable by the business, viewed as a unit, by redistribution of income or capital among the component corporations by means of intercompany transactions. See *Handy & Harman* v. *Burnet*, 284 U. S. 136, 140; *Appeal of Gould Coupler Co.*, 5 B. T. A. 499, 514–516; *cf.* Treasury Regulations 41, Art. 77; Treasury Regulations 45, Art. 631.

It is not denied that the two corporations became affiliated when respondent acquired all the capital stock of the Sales Company. But on the basis of the finding of the Board of Tax Appeals that the Sales Company was chiefly engaged during 1917 in closing up its business preparatory to formal dissolution, which took place in February, 1918, that all its assets and liabilities were disposed of by the end of 1917, and that it did not do any business after that date, petitioner argues that the affiliation of the two companies was terminated by the liquidation.

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[1] Subsequently to 1917, affiliated corporations were required to file such a return for all purposes for any taxable year prior to January 1, 1922 (§ 240, Revenue Act of 1918, 40 Stat. 1057, 1081; § 240, Revenue Act of 1921, 42 Stat. 227, 260). Thereafter, it became optional whether to file a consolidated or separate returns. (§ 240, Revenue Act of 1921; § 240 Revenue Act of 1924, 43 Stat. 253, 288; § 240 Revenue Act of 1926, 44 Stat. 9, 46; §§ 141, 142, Revenue Act of 1928, 45 Stat. 791, 831, 832.)

Since complete stock ownership is made the test of affiliation applicable here under Article 77 of Treasury Regulations 41 and § 1331 of the Revenue Act of 1921, no ground is apparent for saying that the corporations ceased to be affiliated, merely because, without change of corporate control, one of them was being liquidated. The findings do not reveal that the liquidation of the Sales Company was completed, that it ceased to do any business or to function as a corporation before the end of 1917. Neither statute nor regulations recognize that affiliation may be terminated by the mere fact that such liquidation is being carried on, and the reasons for requiring the consolidated return may be quite as valid during that liquidation as before. During that period the unitary character of the business enterprise is not necessarily ended and intercompany manipulations are not precluded.

In the present case, even though the affiliation continued, it does not follow as a matter of law that the loss was not rightly deducted in the consolidated return. Section 12, Revenue Act of 1916, 39 Stat. 756, 767, governs the computation of the excess profits tax under § 206, Revenue Act of 1917, 40 Stat. 300, 305. That section and the regulation under it (see Article 147, Treasury Regulations 33, 1918 ed.), direct that taxable net income of a corporate taxpayer shall be ascertained by deducting, from gross income, losses sustained within the year. It is conceded that the loss of respondent's advances to the Sales Company and the investment in its stock was sustained in 1917, was deductible therefore, if at all, in that year, and might properly have been deducted by respondent in a separate return, if a separate return had been permissible. But the Government insists that the loss cannot be deducted in the mandatory consolidated return for 1917 because it occurred as the result of " intercompany " transactions.

We need not decide whether the loss resulted from intercompany transactions within the meaning of the regulations under later statutes [2] which broadly exclude from the consolidated returns profit or loss upon all such transactions. For neither the Revenue Act of 1917, nor § 1331 of the Revenue Act of 1921, nor the regulations under them [3] prescribe specifically the method of making up the consolidated return or require the elimination from the computation of the tax of the results of all intercompany transactions. Article 77 of Treasury Regulations 41 required every corporation to describe in its return "all its intercorporate relationships with other corporations, with which it is affiliated," and to "furnish such information in relation thereto as will enable the Commissioner of Internal Revenue to compute the amount of the tax properly due from each corporation on the basis of an equitable and lawful accounting." Article 78 authorizes the Commissioner to require consolidated returns of affiliated corporations "wherever necessary to more equitably determine invested capital or taxable income," and provides that "the total tax will be computed in the first instance as a unit on the basis of the consolidated return."

These provisions plainly do not lay down any rigid rule of accounting to be applied to consolidated returns which would exclude from the computation of taxable income the results of every intercompany transaction, regardless

[2] See art. 637, 864 of Treasury Regulations 45 under the Revenue Act of 1918; art. 635, 864 of Treasury Regulations 62 under the Revenue Act of 1921; art. 636 of Treasury Regulations 65 under the Revenue Act of 1924; art. 635 of Treasury Regulations 69 under the Revenue Act of 1926; art. 734 of Treasury Regulations 74 and art. 15, 31, 37 (a), 38 (b) of Treasury Regulations 75 under the Revenue Act of 1928.

[3] Article 1735 of Treasury Regulations 62, under § 1331 of the Revenue Act of 1921, merely refers to Treasury Regulations 41 under the Revenue Act of 1917.

of its effect upon the capital or the net gains or losses of the business of the affiliated corporations. Instead, they merely disclose the purpose underlying regulations and statute to prevent, through the exercise of a common power of control, any intercompany manipulation which would distort invested capital or the true income of the unitary business carried on by the affiliated corporations. Hence, no method of accounting, in calculating taxable income upon the consolidated return, can be upheld, which would withhold from the taxpayer all benefit of deduction for losses actually sustained and deductible under the sections governing the computation of taxable income, and which at the same time would not further, in some way, the very purpose for which consolidated returns are required.

Such, we think, is the effect of the method adopted by the Commissioner. The Sales Company suffered losses during the years 1914, 1915 and 1916 which could not be deducted in its separate returns for those years, because they were net losses, and which could not be deducted from the profits of the parent company because there was no consolidated return in those years. While it may be assumed that those losses affected the value of the stock owned by the parent company, the loss of its investment in the stock of the Sales Company and in advances to it could not be deducted by the parent company in its separate return for those years because the loss had not then been sustained with such finality as to permit its deduction under the applicable statute and regulations. So far as the loss from operation of the Sales Company in earlier years contributed to respondent's capital loss in 1917, deduction of the latter in the consolidated return involved no double deduction of losses of the business of the two companies during the period of their affiliation. As respondent's total loss in 1917 was reduced, before deduction in the consolidated return, by the amount of the

operating loss of the Sales Company for that year, there was no duplication of any losses accrued or sustained in that year.

The loss was a real one, suffered by respondent as a separate corporate entity, and it was equally a loss suffered by the single business carried on by the two corporations during the period of their affiliation, ultimately reflected in the 1917 loss of capital invested in that business. While equitable principles of accounting applied to the calculation of the net income of the business unit do not permit deduction of the loss twice, they do require its deduction once. Hence, the loss was deductible in 1917 under the statute and regulations controlling computation of taxable income, and its deduction is not forbidden by the regulations applicable to the consolidated return. Articles 77 and 78 of Treasury Regulations 41 would, indeed, require the elimination of any losses resulting from intercompany transactions the inclusion of which would defeat the purpose of consolidated returns to tax the true income of the single business of affiliated corporations, calculated by correct accounting methods. The deductions claimed here had no such effect.

Affirmed.

PALMER v. BENDER, ADMINISTRATRIX.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 215. Argued December 14, 15, 1932.—Decided January 9, 1933.

Section 214 of the Revenue Act of 1921 directs that a reasonable allowance for depletion be made as a deduction in computing net taxable income, "in the case of oil and gas wells . . . according to the peculiar conditions of each case." *Held:*

1. That the interests to which the allowance applies are determined by the statute itself, as construed, and not by their formal characterization in the local law. P. 555.

2. A lessee of oil wells who transfers them to another, stipulating for a royalty or bonus from oil to be produced, thereby retains an economic interest in the oil in place, which is depleted by production and which comes within the meaning and purpose of the statute, whether his conveyance be deemed by the law of the State a sublease or an assignment. P. 558.

57 F. (2d) 32, reversed.

CERTIORARI * to review the affirmance of a judgment, 49 F. (2d) 316, denying in part the petitioner's claim in an action to recover money paid as income taxes. The action was begun against the Collector and the administratrix was substituted upon his death.

Mr. John H. Tucker, Jr., with whom *Messrs. Fred R. Angevine, Henry P. Dart, Jr.*, and *Henry P. Dart* were on the brief, for petitioner.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher*, and *Messrs. Whitney North Seymour, J. Louis Monarch*, and *Andrew D. Sharpe* were on the brief, for respondent.

Petitioner relies on *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, but that case can have no present application for it dealt with the right of a lessor to deduct depletion. The partnerships of which petitioner was a member were neither lessors nor sublessors of oil properties. Upon execution of the instruments, petitioner and his associates parted with their entire interest. Thereafter they retained no depletable property against which an allowance could be made. The petitioner apparently recognizes that if this was the case there is no basis for a depletion allowance to him and the question therefore is, whether such instruments constituted assignments effecting a sale, or subleases.

The Revenue Act of 1921, § 213 (a), c. 136, 42 Stat. 227, 237–238, provides that the gain, profits, or income

* See Table of Cases Reported in this volume.

from the sale of property is gross income. The basis for ascertaining the gain derived from the sale of property acquired after February 28, 1913, is the cost. Revenue Act of 1921, § 202 (a), 42 Stat. 227, 229. No provision allows a deduction for depletion from the amount received upon a sale of property in mineral deposits, or for exhaustion in case of the sale of an incorporeal right.

Under the law of Louisiana, and generally in common law jurisdictions, the instruments were assignments and not leases. Presumably the local law would control in this case. See *Burnet* v. *Harmel*, 287 U. S. 103. Whichever law is to be applied the result is the same. The transfers in question effected " a sale or other disposition of property " within the meaning of § 202 (a) of the Revenue Act of 1921.

Mr. Justice Stone delivered the opinion of the Court.

Petitioner brought suit in the District Court for Western Louisiana to recover taxes alleged to have been illegally exacted for 1921 and 1922 upon income derived from oil properties by petitioner as a member of two partnerships, known respectively as the Smitherman and Baird partnerships. Both partnerships, after 1913, acquired oil and gas leases of unproved Louisiana lands and engaged in drilling operations on them which resulted in discovery of oil on March 30, 1921, in the case of the Smitherman leases, and on August 23, 1919, in the case of the Baird leases.

In April, 1921, the Smitherman partnership executed a writing by which it conferred on the Ohio Oil Company the right to take over a part of the leased property on which the producing well was located, subject to the obligations of the covenants of the leases, in consideration of a present payment of a cash bonus, a future payment to be made " out of one-half of the first oil produced and saved " to the extent of $1,000,000, and an additional " ex-

cess royalty" of one-eighth of all the oil produced and saved. The instrument in terms stated that the partnership "does sell, assign, set over, transfer and deliver . . . unto the Ohio Oil Company" the described leased premises. The Baird partnership, in November, 1921, gave a similar document to the Gulf Refining Company containing some additional features which in the view we take are immaterial. It too stipulated for future payment of royalties in kind from the oil produced and saved.

Petitioner's tax returns for the years 1921 and 1922 reported his distributive share of the income from the Smitherman partnership, derived from the bonus payment and oil received under its contract with the Ohio Oil Company, and also his share in the income from the Baird partnership from oil received under its contract with the Gulf Refining Company. In the returns for both years petitioner, relying upon the provisions of § 214 (a) (10) of the Revenue Act of 1921, 42 Stat. 239, regulating depletion allowances in the case of oil and gas wells, made a deduction for depletion based on the value of the oil in place in the two properties on the respective dates of discovery.

The Commissioner refused to allow these deductions, on the theory that both transactions were sales of the leases by the partnerships and that the only allowable deductions, in calculating taxable gain, are those based upon the cost of the respective properties to petitioner, in each case materially less than their value at the date of the discovery of oil. This resulted in the assessment and payment of an increased tax which is the subject of the present suit. Judgment of the District Court, 49 F. (2d) 316, denying petitioner the right to make the deductions claimed, was affirmed by the Court of Appeals for the Fifth Circuit, 57 F. (2d) 32. This court granted certiorari.

Both courts below, following earlier decisions of the Court of Appeals with respect to the two instruments

involved here, held that they were assignments or sales of the leases for the stipulated consideration of bonus paid and royalties to be received. See *Waller* v. *Commissioner,* 40 F. (2d) 892; *Herold* v. *Commissioner,* 42 F. (2d) 942. The Government rests its case on this conclusion. It concedes that if any reversionary interest, according to the common law, however small, has been retained in the leased land by the two partnerships, the petitioner is entitled to the depletion allowances claimed, but insists that no such interest was reserved by the instruments in question. Petitioner contends that by the Louisiana law any transfer of an interest in land, yielding to the transferor, as consideration, the fruits of the land as they may be produced, such as the royalty oil in the present case, must be regarded as a lease. See *Robertson* v. *Pioneer Gas Company,* 173 La. 313. From this he concludes that the two instruments were subleases and invokes the rule recently affirmed in *Murphy Oil Co.* v. *Burnet, ante,* p. 299, that the lessor of an oil and gas well is entitled to a depletion allowance upon bonus and royalties received from the lessee, under § 234 (a) (9) of the Revenue Act of 1918. Section 214 (a) (10) of the Revenue Act of 1921, which is applicable here, contains the same provisions.

It has been elaborately argued at the bar and in the briefs whether under Louisiana law the two instruments are assignments or subleases. We do not think the distinction material. Nothing in § 214 (a) (10) indicates that its application is to be controlled or varied by any particular characterization by local law of the interests to which it is to be applied. See *Burnet* v. *Harmel, ante,* p. 103. We look to the statute itself and to the decisions construing it to ascertain to what interests it is to be applied and then to the particular interests secured to the two partnerships by the instruments in question to ascertain whether they come within the statutory provision. The formal attributes of those instruments or the descrip-

tive terminology which may be applied to them in the local law are both irrelevant.

Sec. 214 (a) (10) of the Act of 1921 so far as now material is printed in the margin.[1] It will be observed that the statute directs that reasonable allowance for depletion be made as a deduction in computing net taxable income, " in the case of oil and gas wells, . . . according to the peculiar conditions in each case." The allowance to the taxpayer is not restricted by the words of the statute to cases of any particular class or to any special form of legal interest in the oil well. It is true that under Article 215 of Treasury Regulations 62 the lessor of an oil or gas well is entitled to a depletion allowance upon the bonus and royalties received from the lessee. See *Murphy Oil Co.* v. *Burnet, supra.* But there is nothing in the statute or regulations which confines depletion allowances to those who are technically lessors. The concluding sentence of the section that " In the case of leases the deductions allowed by this paragraph shall be equitably appor-

[1] Sec. 214. (a) That in computing net income there shall be allowed as deductions:

. . . . . .

(10) In the case of mines, oil and gas wells, . . . a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: . . . *Provided further,* That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter: . . . such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and the lessee. . . .

tioned between the lessor and the lessee" presupposes that the deductions may be allowed in other cases. The language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital.

That the allowance for depletion is not made dependent upon the particular legal form of the taxpayer's interest in the property to be depleted was recognized by this Court in *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364. There a depletion allowance under § 12 (a) of the 1916 Act, 39 Stat. 767, was claimed by a lessee of a mining lease, in the computation of tax on income from the proceeds of ore mined. The statute made no specific reference to lessees and the Government argued that as the lessee acquired no ownership of the ore until the severance from the soil (see *United States* v. *Biwabik Mining Co.*, 247 U.S. 116, 123) the lease gave him no depletable interest in the ore in place. But this Court held that regardless of the technical ownership of the ore before severance, the taxpayer, by his lease, had acquired legal control of a valuable economic interest in the ore capable of realization as gross income by the exercise of his mining rights under the lease. Depletion was, therefore, allowed.

Similarly, the lessor's right to a depletion allowance does not depend upon his retention of ownership or any other particular form of legal interest in the mineral content of the land. It is enough if, by virtue of the leasing transaction, he has retained a right to share in the oil produced. If so he has an economic interest in the oil, in place, which is depleted by production. Thus, we have recently held that the lessor is entitled to a depletion allowance on bonus and royalties, although by the local

law ownership of the minerals, in place, passed from the lessor upon the execution of the lease. See *Burnet* v. *Harmel, supra; Bankers Pocahontas Coal Co.* v. *Burnet, ante* p. 308.

In the present case the two partnerships acquired, by the leases to them, complete legal control of the oil in place. Even though legal ownership of it, in a technical sense, remained in their lessor, they, as lessees, nevertheless acquired an economic interest in it which represented their capital investment and was subject to depletion under the statute. *Lynch* v. *Alworth-Stephens Co., supra.* When the two lessees transferred their operating rights to the two oil companies, whether they became technical sublessors or not, they retained, by their stipulations for royalties, an economic interest in the oil, in place, identical with that of a lessor. *Burnet* v. *Harmel, supra; Bankers Pocahontas Coal Co.* v. *Burnet, supra.* Thus, throughout their changing relationships with respect to the properties, the oil in the ground was a reservoir of capital investment of the several parties, all of whom, the original lessors, the two partnerships and their transferees, were entitled to share in the oil produced. Production and sale of the oil would result in its depletion and also in a return of capital investment to the parties according to their respective interests. The loss or destruction of the oil at any time from the date of the leases until complete extraction would have resulted in loss to the partnerships. Such an interest is, we think, included within the meaning and purpose of the statute permitting deduction in the case of oil and gas wells of a reasonable allowance for depletion according to the peculiar conditions in each case.

The statute makes effective the legislative policy, favoring the discoverer of oil, by valuing his capital investment for purposes of depletion at the date of the discovery rather than at its original cost. The benefit of it accrues

to the discoverer if he operates the well as owner or lessee, or if he leases it to another. It would be an anomaly if that policy were to be defeated and all benefit of the depletion allowance withheld because he chose to secure the return of his capital investment by stipulating for a share of the oil produced from the discovered well through operation by another.

The bonus received by the Smitherman partnership was a return *pro tanto* of the petitioner's capital investment in the oil, in anticipation of its extraction, resulting in a corresponding diminution in the unit depletion allowance upon the royalty oil as produced. Compare *Murphy Oil Co.* v. *Burnet, supra.*

Reversed.

DECISIONS PER CURIAM, FROM OCTOBER 3, 1932, TO AND INCLUDING JANUARY 9, 1933.*

No. 300 (October Term, 1931). SOUTHERN RY. Co. *v.* KENTUCKY; and

No. 301 (October Term, 1931). MELLON, DIRECTOR GENERAL OF RAILROADS, *v.* SAME.

Appeals from the Court of Appeals of Kentucky. October 10, 1932. In these cases the parties have made and lodged with the Clerk a stipulation as follows:

"It is stipulated and agreed between the parties that, due to a mutual mistake of fact, not discovered by either party until after the judgment of affirmance in this Court, there is no tax involved herein due the Commonwealth of Kentucky, and that the judgment of affirmance in these causes as shown in the opinion of this Court rendered January 4, 1932, be set aside and the cases be dismissed, and that such mandate of this Court go down as will effectuate this agreement. It is further agreed that the appellants pay all taxable costs not heretofore paid."

It is ordered that the stipulation be filed; that in each case the judgment of this Court affirming the judgment appealed from is hereby set aside and the case is dismissed; that appellant pay all taxable costs not heretofore paid and that the case be remanded to the Court of Appeals of Kentucky for such proceedings as will effectuate the above-quoted agreement. [See 284 U. S. 338.]

No. 34. RHODES ET AL. *v.* TWING ET AL. Appeal from the Supreme Court of Texas. Jurisdictional statement

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* For decisions on applications for certiorari, see *post*, pp. 580, 596.

submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a properly presented federal question. *Godchaux* v. *Estopinal,* 251 U. S. 179, 181; *Jett Bros. Co.* v. *Carrollton,* 252 U. S. 1, 6, 7; *Citizens National Bank* v. *Durr,* 257 U. S. 99, 106; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 116, 117; *Live Oak Water Users Assn.* v. *Railroad Commission,* 269 U. S. 354, 357. *Mr. Oliver J. Todd* for appellants. *Mr. Jewell P. Lightfoot* for appellees. Reported below: 41 S. W. (2d) 13.

No. 35. Williams et al. *v.* H. C. Speer & Sons Co. et al. Appeal from the Supreme Court of Texas. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a properly presented federal question. *Godchaux* v. *Estopinal,* 251 U. S. 179, 181; *Jett Bros. Co.* v. *Carrollton,* 252 U. S. 1, 6, 7; *Citizens National Bank* v. *Durr,* 257 U. S. 99, 106; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 116, 117; *Live Oak Water Users Assn.* v. *Railroad Commission,* 269 U. S. 354, 357. *Mr. Oliver J. Todd* for appellants. *Mr. Jewell P. Lightfoot* for appellees. Reported below: 41 S. W. (2d) 14.

No. 44. Savelle *v.* State Board of Dental Examiners et al. Appeal from the Supreme Court of Colorado. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a final judgment. *Haseltine* v. *Central Bank of Springfield,* 183 U. S. 130, 131; *Schlosser* v. *Hemphill,* 198 U. S. 173, 175, 176; *Louisiana Navigation Co.* v. *Oyster Commission,* 226 U. S. 99, 101; *California National Bank* v. *Stateler,* 171 U. S. 447, 449; *Bruce* v. *Tobin,* 245 U. S. 18, 19, 20; *Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.,* 243

U. S. 251, 255, 256; *Ornstein* v. *Chesapeake & Ohio Ry. Co.*, 284 U. S. 572. *Messrs. Emory L. O'Connell, Albert E. Sherlock,* and *Arthur X. Erickson* for appellant. *Messrs. Clarence L. Ireland* and *Charles H. Haines* for appellees. Reported below: 90 Colo. 177; 8 P. (2d) 693.

No. 45. MILLER *v.* STATE BOARD OF DENTAL EXAMINERS OF COLORADO ET AL. Appeal from the Supreme Court of Colorado. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 108, 111; *Fox* v. *Washington,* 236 U. S. 273, 277, 278; *Miller* v. *Strahl,* 239 U. S. 426, 434; *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 501, 502, 503; *Sprolec* v. *Binford,* 286 U. S. 374, 393; *Lavine* v. *California,* 286 U. S. 528. In so far as the papers whereon the appeal was allowed seek review of the ruling of the Supreme Court of Colorado upon the asserted denial of rights under the Federal Constitution by the proceedings before the State Board in this cause, not involving the validity of any statute of the State, such papers are treated as a petition for writ of certiorari (§ 237(c), Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 938) and certiorari is denied. *Messrs. Emory L. O'Connell, Albert E. Sherlock,* and *Arthur X. Erickson* for appellant. *Messrs. Clarence L. Ireland* and *Charles H. Haines* for appellees. Reported below: 90 Colo. 193; 8 P. (2d) 699.

No. 46. BROWN ET AL. *v.* BANK OF COMMERCE & TRUST CO. ET AL. Appeal from the Supreme Court of Mississippi. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The mo-

tion of the appellees to affirm the decree herein, and for an award of damages pursuant to § 878, Title 28, U. S. Code, is denied. The appeal in this cause is dismissed for the want of a substantial federal question. *Missouri Pacific R. Co.* v. *Western Crawford Road Improvement District,* 266 U. S. 187; *Miller & Lux* v. *Sacramento & San Joaquin Drainage District,* 256 U. S. 129; *Houck* v. *Little River Drainage District,* 239 U. S. 254. *Messrs. Wm. H. Watkins* and *A. F. Gardner* for appellants. *Messrs. Julian C. Wilson* and *Walter P. Armstrong* for appellees. Reported below: 138 So. 558.

No. 64. THOMAS ET AL. *v.* RABB. Appeal from the County Court of Rains County, Texas. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c), Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Charles L. Morgan* for appellants. No appearance for appellee.

No. 243. DUNNE *v.* MARYLAND. Appeal from the Court of Appeals of Maryland. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c), Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Messrs. E. Barrett Prettyman* and

Preston C. King, Jr., for appellant. *Mr. Wm. Preston Lane, Jr.*, for appellee. Reported below: 162 Md. 274; 159 Atl. 751.

No. 266. STEARNS, RECEIVER, ET AL. *v.* LORENZ ET AL. Appeal from the Supreme Court of New Hampshire. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c), Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Messrs. Charles O. Pengra* and *Weld A. Rollins* for appellants. *Mr. John J. McDonald* for appellees. Reported below: 85 N. H. 494; 161 Atl. 205.

No. 123. S. S. KRESGE CO. *v.* BENNETT, ATTORNEY GENERAL OF NEW YORK, ET AL. Appeal from the District Court of the United States for the Southern District of New York. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* Decree affirmed. *Gorham Mfg. Co.* v. *State Tax Commission,* 266 U. S. 265, 269, 270. *Mr. Edward K. Hanlon* for appellant. *Mr. Wendell P. Brown* for appellees. Reported below: 51 F. (2d) 353.

No. 135. AMERICAN AIRWAYS, INC. *v.* WALLACE, COMPTROLLER OF TENNESSEE, ET AL. Appeal from the District Court of the United States for the Middle District of Tennessee. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The order denying interlocutory injunction is affirmed. *Alabama* v. *United States,* 279 U. S. 229, 231; *United Fuel*

Gas Co. v. *Public Service Commission,* 278 U. S. 322, 326; *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 338; *United Drug Co.* v. *Washburn,* 284 U. S. 593; *Binford* v. *J. H. McLeaish & Co.,* 284 U. S. 598; *South Carolina Power Co.* v. *South Carolina Tax Commission,* 286 U. S. 525; *Ogden & Moffett Co.* v. *Michigan Public Utilities Commission,* 286 U. S. 525. *Mr. J. W. Canada* for appellant. No appearance for appellees. Reported below: 57 F. (2d) 877.

No. 231. Brannan et al. *v.* Harrison, Comptroller General. Appeal from the Supreme Court of Georgia. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, 537, 542; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 573; *Singer Sewing Machine Co.* v. *Brickell,* 233 U. S. 304, 315; *Bradley* v. *Richmond,* 227 U. S. 477. *Messrs. C. N. Davie* and *James F. Kemp* for appellants. No appearance for appellee. Reported below: 174 Ga. 907; 164 S. E. 760.

No. 238. New York Dock Co. *v.* New York & Cuba Mail S. S. Co. Appeal from the Supreme Court of New York. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Homer Ramsdell Transportation Co.* v. *LaCompagnie Generale Transatlantique,* 182 U. S. 406. *Mr. Alexander J. Field* for appellant. *Messrs. Chauncey I. Clark* and *Eugene Underwood* for appellee. Reported below: 259 N. Y. 606; 181 N. E. 200.

No. 253. LINCOLN FIREPROOF WAREHOUSE CO. *v.* MILWAUKEE ET AL. Appeal from the Supreme Court of Wisconsin. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 450, 451, 455, 456; *American Ry. Express Co.* v. *Kentucky,* 273 U. S. 269, 273; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 680. *Mr. Robert M. Rieser* for appellant. *Mr. Daniel W. Hoan* for appellees. Reported below: 208 Wis. 70; 241 N. W. 623; 242 N. W. 558.

No. 285. HARNISCHFEGER ET AL., EXECUTORS, ET AL. *v.* WISCONSIN TAX COMMISSION. Appeal from the Supreme Court of Wisconsin. Jurisdictional statement submitted September 15, 1932. Decided October 10, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Mobile, Jackson & Kansas City R. Co.* v. *Turnipseed,* 219 U. S. 35, 43; *Bandini Petroleum Co.* v. *Superior Court,* 284 U. S. 8, 18, 19; *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29. *Messrs. Louis Quarles* and *Russell Jackson* for appellants. *Mr. John W. Reynolds* for appellee. Reported below: 208 Wis. 317; 242 N. W. 153; 243 N. W. 453.

No. —, original. EX PARTE MILES. Motion submitted October 3, 1932. Decided October 10, 1932. The motion for leave to file petition for writ of habeas corpus is denied, without prejudice to proper application to the appropriate District Court of the United States or to the Judge of said Court. *Mr. W. S. Miles, pro se.*

No. 5, original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;

No. 8, original. MICHIGAN ET AL. *v.* SAME; and

No. 9, original. NEW YORK ET AL. *v.* SAME. October 10, 1932. The report of the defendant, Sanitary District of Chicago, dated July 1, 1932, is received. Upon consideration of the complainants' motion,

It is ordered that a rule issue to the defendants in the above entitled causes to show cause, by printed return, on or before Monday, November 7 next, why they have not taken appropriate steps to effect compliance with the requirements of the decree of this Court in these causes dated April 21, 1930 (281 U. S. 696);

And it is further ordered that these causes be set for oral argument upon the return of such rule upon Monday, November 14 next, at the head of the call for that day, briefs to be filed by the parties at the time of such argument.

Messrs. John W. Reynolds, Attorney General of Wisconsin, *Henry N. Benson,* Attorney General of Minnesota, *Gilbert Bettman,* Attorney General of Ohio, *Paul W. Voorhies,* Attorney General of Michigan, *Herbert H. Naujoks,* Assistant Attorney General of Wisconsin, and *Raymond R. Jackson,* Special Assistant to the Attorneys General, for complainants. *Messrs. William Rothmann, Frank Johnson, Jr., Joseph B. Fleming,* and *Oscar E. Carlstrom,* Attorney General of Illinois, for the defendants.

No. —. CHERAMI ET AL. *v.* CANTRELLE ET AL.; and

No. —. SAME *v.* GUIDROZ ET AL. October 10, 1932. The petition of *Mr. Charles D. Breaux* et al. for an extension of time within which to apply for writs of certiorari in the above entitled matters is denied. *Finn* v. *Railroad Commission,* 286 U. S. 559; *Cresswell* v. *Tillinghast,* 286 U. S. 560.

No. 387. FOUTS ET AL. *v.* GEORGIA. Appeal from the Supreme Court of Georgia. Jurisdictional statement submitted September 29, 1932. Decided October 10, 1932. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied. The appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c), Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Robert R. Jackson* for appellants. No appearance for appellee. Reported below: 175 Ga. 71; 165 S. E. 78.

No. 627 (October Term, 1931). PORTER, AUDITOR, *v.* INVESTORS SYNDICATE. October 17, 1932. The petition for a rehearing is granted. *Mr. M. S. Gunn* for petitioner. For decision on rehearing see *ante*, p. 346.

No. 13. LOUISVILLE & NASHVILLE R. Co. *v.* PARKER, ADMINISTRATRIX. On writ of certiorari to the Supreme Court of Alabama. Argued October 17, 18, 1932. Decided October 24, 1932. *Per Curiam:* The writ of certiorari herein is dismissed, upon the ground that the judgment sought here to be reviewed is joint and the record fails to disclose summons and severance. *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U. S. 169; *Capital National Bank* v. *Board of Supervisors*, 286 U. S. 550; *Fidelity Union Casualty Co.* v. *Hanson*, *post*, p. 599. *Mr. Chas. H. Eyster*, with whom *Mr. Robert E. Steiner, Jr.*, was on the brief, for petitioner. *Mr. W. A. Denson* was on the brief for respondent. Reported below: 223 Ala. 626; 138 So. 231.

No. 16. ASBURY TRUCK CO. *v.* RAILROAD COMMISSION. Appeal from the District Court of the United States for the Southern District of California. Argued October 18, 1932. Decided October 24, 1932. *Per Curiam:* Decree affirmed. *Castillo* v. *McConnico,* 168 U. S. 674, 683; *McDonald v. Oregon Navigation Co.,* 233 U. S. 665, 669, 670; *Iowa Central Ry. Co.* v. *Iowa,* 160 U. S. 389, 392, 393; *Hebert* v. *Louisiana,* 272 U. S. 312, 316, 317; *Kansas City Public Service Co.* v. *Ranson,* 285 U. S. 528. *Mr. Warren E. Libby* for appellant. *Mr. Arthur T. George* for appellee. Reported below: 52 F. (2d) 263.

No. 25. NEW YORK CENTRAL R. CO. *v.* FARMER, ADMINISTRATRIX. On writ of certiorari to the Supreme Court of New York. Argued October 20, 1932. Decided October 24, 1932. *Per Curiam:* Judgment reversed. *Southern Ry. Co.* v. *Moore,* 284 U. S. 581; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Saxon,* 284 U. S. 458; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Toops,* 281 U. S. 351; *New York Central R. Co.* v. *Ambrose,* 280 U. S. 486. MR. JUSTICE CARDOZO took no part in the consideration and decision of this case. *Mr. Clive C. Handy,* with whom *Mr. William Mann* was on the brief, for petitioner. *Mr. Henry S. Miller* for respondent. Reported below: 234 App. Div. 751; 253 N. Y. S. 965.

No. 36. GIRARD LIFE INSURANCE CO. *v.* PENNSYLVANIA. Appeal from the Supreme Court of Pennsylvania. Argued October 21, 1932. Decided October 24, 1932. *Per Curiam:* Judgment affirmed. *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37, 40; *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159; *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, 537, 538. *Mr. Ira Jewell Williams, Jr.,*

with whom *Messrs. Ira Jewell Williams, Francis Shunk Brown,* and *W. S. Snyder* were on the brief, for appellant. *Messrs. William A. Schnader,* Attorney General of Pennsylvania, and *Philip S. Moyer,* Deputy Attorney General, were on the brief for appellee. Reported below: 305 Pa. 558; 158 Atl. 262.

No. 20, original. WISCONSIN *v.* MICHIGAN. Motion submitted October 17, 1932. Decided October 24, 1932. The motion for leave to file the bill of complaint is granted and process is ordered to issue returnable within sixty days from this date. *Messrs. John W. Reynolds* and *Joseph E. Messerschmidt* for complainant. No appearance for defendant.

No. —, original. EX PARTE INTERNATIONAL SAFETY RAZOR CORP. ET AL. Motion submitted October 17, 1932. Decided October 24, 1932. The motion for leave to file petition for writ of prohibition or mandamus is denied. The CHIEF JUSTICE and MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Mr. Martin A. Schenck* for petitioners.

No. 452. WAGNER *v.* LEENHOUTS ET AL. Appeal from the Supreme Court of Wisconsin. Jurisdictional statement submitted October 22, 1932. Decided November 7, 1932. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the reason that the judgment of the state court here sought to be reviewed was based upon a non-federal ground adequate to support it. *McCoy* v. *Shaw,* 277 U. S. 302, 303; *Arneson* v. *United Irrigation Co.,* 284 U. S. 592, 593; *Potter* v. *Maybury,* 284 U. S. 593, 594; *Ellison Ranching Co.* v. *Bartlett,* 284 U. S. 598. *Mr. Fred R.*

Wright for appellant. *Messrs. John W. Reynolds, Herbert H. Naujoks,* and *C. Stanley Perry* for appellees. Reported below: 208 Wis. 292; 242 N. W. 144.

No. 400. CHANDLER *v.* MAINE. Appeal from the Supreme Judicial Court of Maine. Jurisdictional statement submitted October 29, 1932. Decided November 7, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Storaasli* v. *Minnesota,* 283 U. S. 57, 62, 63, 64; *Sproles* v. *Binford,* 286 U. S. 374, 396; *Hendrick* v. *Maryland,* 235 U. S. 610; *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29, 38. *Mr. John P. Deering* for appellant. *Mr. Clement F. Robinson* for appellee. Reported below: 131 Me. 262; 161 Atl. 148.

No. 462. HIBERNIA BANK & TRUST CO. ET AL. *v.* MAXWELL. Appeal from the Supreme Court of Louisiana. Jurisdictional statement submitted October 29, 1932. Decided November 7, 1932. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c), Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Messrs. Benjamin A. Dart, Henry P. Dart, Jr.,* and *Percy S. Benedict* for appellants. *Messrs. R. E. Milling* and *Emile Godchaux* for appellee. Reported below: 175 La. 252; 143 So. 230.

No. —, original. EX PARTE JAMES. Return to rule to show cause presented October 27, 1932. Decided November 7, 1932. Upon consideration of the return of the re-

spondent to the rule to show cause heretofore issued in this matter, it is ordered that the motion of the petitioner for leave to file a petition for a writ of mandamus to require the respondent to call to his assistance two other federal judges, in the manner provided by § 380, title 28, U. S. Code, to hear and determine the applications for interlocutory and final injunction in a cause entitled Charles Clay James *v.* Horace Frierson, jr., et al., be, and the same is hereby, denied, in view of the fact that it would be entirely impracticable to convene the specially constituted District Court and to procure a hearing in time to make any decree effective prior to the general election. *Messrs. John Randolph Neal* and *Henry Nathan Camp, Jr.*, for petitioner. *Messrs. J. J. Lynch, James A. Fowler,* and *J. H. Frantz* for respondent.

No. —, original. Ex parte Williams. November 7, 1932. The motion for leave to file a petition for a writ of habeas corpus is denied without prejudice to appropriate application to the proper District Court of the United States or Judge. *Mr. Joseph Williams, pro se.*

No. 356. Indian Territory Illuminating Oil Co. *v.* Board of Equalization of Tulsa County, Oklahoma; and

No. 357. Same v. Board of County Commissioners of Payne County, Oklahoma. Appeals from the Supreme Court of Oklahoma. Jurisdictional statement submitted October 29, 1932. Decided November 7, 1932. *Per Curiam:* The appeals herein are dismissed for the want of jurisdiction. Section 237 (a), Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937); *Citizens National Bank* v. *Durr,* 257 U. S. 99, 106, 107; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 4, 5, 6. Treating the papers whereon the appeals in these

causes were allowed as petitions for writs of certiorari, § 237 (c), Judicial Code as amended (43 Stat. 936, 938), consideration thereof is postponed and leave is granted to petitioners to file briefs supporting applications for certiorari within fifteen days, with ten days for opposing counsel to reply. *Messrs. John H. Miley* and *Wm. P. McGinnis* for appellant. *Mr. Hugh Webster* for the Board of Equalization of Tulsa County. *Messrs. Ernest F. Jenkins* and *Guy L. Horton* for the Board of County Commissioners of Payne County. Reported below: 159 Okla. 6, 15; 13 P. (2d) 585, 14 P. (2d) 929.

No. 218. KROGER GROCERY & BAKING CO. *v.* YOUNT. Certificate from the Circuit Court of Appeals for the Eighth Circuit. Argued November 7, 1932. Decided November 14, 1932. *Per Curiam:* The certificate herein is dismissed. *Wells* v. *Commissioner,* 286 U. S. 529; *White* v. *Johnson,* 282 U. S. 367, 371; *United States* v. *Worley,* 281 U. S. 339, 340; *United States* v. *Mayer,* 235 U. S. 55, 56. *Mr. Walter H. Saunders,* with whom *Messrs. John S. Leahy, Lambert E. Walther,* and *J. L. London* were on the brief, for Kroger Grocery & Baking Co. *Mr. R. L. Ward,* with whom *Mr. J. Henry Caruthers* was on the brief, for Yount.

No. 220. CATAGRONE *v.* UNITED STATES. Certificate from the Circuit Court of Appeals for the Eighth Circuit. Argued November 8, 1932. Decided November 14, 1932. *Per Curiam:* The certificate herein is dismissed. *Wells* v. *Commissioner,* 286 U. S. 529; *White* v. *Johnson,* 282 U. S. 367, 371; *United States* v. *Worley,* 281 U. S. 339, 340; *United States* v. *Mayer,* 235 U. S. 55, 56. *Mr. Anthony P. Nugent* for Catagrone. *Assistant Attorney General Youngquist,* with whom *Solicitor General*

Thacher and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* were on the brief, for the United States.

No. 41. Sevier Commission Co. et al. *v.* Wallowa National Bank. Certiorari to the Supreme Court of Oregon. Argued November 10, 1932. Decided November 14, 1932. *Per Curiam:* The writ of certiorari herein is dismissed for want of a substantial federal question. *Wabash Ry. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. Co.* v. *Solomon,* 237 U. S. 427; *C. A. King & Co.* v. *Horton,* 276 U. S. 600; *Bank of Indianola* v. *Miller,* 276 U. S. 605; *Roe* v. *Kansas,* 278 U. S. 191. *Mr. John F. Reilly,* with whom *Mr. James G. Wilson* was on the brief, for petitioners. *Mr. Palmer L. Fales,* with whom *Messrs. Robert Treat Platt* and *Harrison G. Platt* were on the brief, for respondent. Reported below: 138 Ore. 393; 5 P. (2d) 100.

No. 414. Biggs, Administratrix *v.* Missouri Pacific R. Co. et al.; and

No. 415. Graves *v.* Same. Appeals from the District Court of the United States for the Eastern District of Arkansas. Jurisdictional statement submitted November 12, 1932. Decided November 21, 1932. *Per Curiam:* The appeals herein are dismissed for the want of jurisdiction. Section 238, Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 938), U. S. Code, Title 28, § 345; § 13, Act of February 13, 1925 (43 Stat. 936, 941). *Mr. G. T. Fitzhugh* for petitioners. *Messrs. Edward J. White* and *Thomas B. Pryor* for respondents.

No. 519. Mahan, Secretary of State, *v.* Hume. Appeal from the District Court of the United States for the Eastern District of Kentucky. Jurisdictional statement

submitted November 26, 1932. Decided December 5, 1932. *Per Curiam:* Decree reversed and cause remanded with directions to dismiss the bill of complaint. *Brownlow* v. *Schwartz,* 261 U. S. 216; *Wood* v. *Broom, ante,* p. 1. *Messrs. S. H. Brown* and *Francis M. Burke* for appellant. No appearance for appellee. Reported below: 1 F. Supp. 142.

No. 32. Railroad Commission of Texas et al. *v.* Macmillan et al. Appeal from the District Court of the United States for the Western District of Texas. Argued December 6, 1932. Decided December 12, 1932. *Per Curiam:* Decree reversed and cause remanded with directions to dismiss the bill of complaint. *Brownlow* v. *Schwartz,* 261 U. S. 216; *Alejandrino* v. *Quezon,* 271 U. S. 528, 535, 536; *U. S. ex rel. Norwegian Nitrogen Products Co.* v. *Tariff Comm'n,* 274 U. S. 106, 112. *Mr. Maurice Cheek,* Assistant Attorney General of Texas, with whom *Messrs. James V. Allred,* Attorney General, *Fred Upchurch,* Assistant Attorney General, *Robert E. Hardwicke, Marion S. Church,* and *Conrad E. Cooper* were on the brief, for appellants. *Mr. J. N. Saye,* with whom *Messrs. J. K. Mahony, H. P. Smead, W. T. Saye, I. J. Ringolsky, Wm. G. Boatright,* and *Harry L. Jacobs* were on the brief, for appellees. Reported below: 51 F. (2d) 400.

No. 449. Haskell et al. *v.* California. Appeal from the Superior Court of the County of Los Angeles, Appellate Department, of California. Jurisdictional statement submitted December 3, 1932. Decided December 12, 1932. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by

§237 (c), Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Hugh L. Dickson* for appellants. *Messrs. U. S. Webb* and *Tracy Chatfield Becker* for appellee.

No. 202. THIRD NATIONAL BANK & TRUST CO. ET AL., EXECUTORS *v.* WHITE, COLLECTOR OF INTERNAL REVENUE. On writ of certiorari to the Circuit Court of Appeals for the First Circuit. Argued December 14, 1932. Decided December 19, 1932. *Per Curiam:* Judgment affirmed. *Tyler* v. *United States,* 281 U. S. 497, 504, 505; *Gwinn* v. *Commissioner, ante,* p. 224. *Mr. Harold P. Small* for petitioners. *Solicitor General Thacher, Assistant Attorneys General Rugg* and *Youngquist, Miss Helen R. Carloss,* and *Messrs. J. Louis Monarch* and *Erwin N. Griswold* were on the brief for respondent. By leave of Court, *Messrs. Benjamin Greenspan* and *Richard Kelly* and *Messrs. Abbot P. Mills, William P. Smith,* and *John C. Evans* filed briefs as *amici curiae.* The Circuit Court of Appeals filed no opinion. The opinion of the District Court is reported in 45 F. (2d) 911.

No. 530. REAL ESTATE-LAND TITLE & TRUST CO., TRUSTEE, *v.* SPRINGFIELD ET AL. Appeal from the Supreme Court. of Ohio. Jurisdictional statement submitted December 10, 1932. Decided December 19, 1932. *Per Curiam:* The appeal herein is dismissed for the reason that the judgment of the state court sought here to be reviewed was based upon a non-federal ground adequate to support it. *New Orleans Water Works Co.* v. *Louisiana Sugar Co.,* 125 U. S. 18, 38, 39; *Cross Lake Club* v. *Louisiana,* 224 U. S. 632, 639, 640; *Long Sault Development Co.* v. *Call,* 242 U. S. 272, 277, 278; *Hardin-Wyandot Lighting Co.* v. *Upper Sandusky,* 251 U. S. 173, 178, 179; *Girard Trust Co.* v. *Ocean & Lake Realty Co.,* 286 U. S. 523.

Messrs. Leslie Nichols and *Maurice Bower Saul* for appellant. *Messrs. M. E. Spencer* and *A. J. Todd* for appellees. Reported below: 125 Oh. St. 531; 182 N. E. 501.

No. 5, original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;

No. 8, original. MICHIGAN ET AL. *v.* SAME; and

No. 9, original. NEW YORK ET AL. *v.* SAME. Argued December 5, 6, 1932. Order entered December 19, 1932. Upon consideration of the return of the defendants in the above-entitled causes to the rule issued October 10, 1932, requiring them to show cause why they have not taken appropriate steps to effect compliance with the requirements of the decree of this Court in these causes dated April 21, 1930 (281 U. S. 696), and of the argument had thereon,

IT IS ORDERED that these causes be referred to Edward F. McClennen, Esquire, as a Special Master, with directions and authority to make summary inquiry and to report to the Court on or before April 1, 1933,

(1) as to the causes of the delay in obtaining approval of the construction of controlling works in the Chicago River and the steps which should now be taken to secure such approval and prompt construction;

(2) as to the causes of the delay in providing for the construction of the Southwest Side Treatment Works, and the steps which should now be taken for such construction or, in case of a change in site, for the construction of an adequate substitute;

(3) as to the financial measures on the part of the Sanitary District or the State of Illinois which are reasonable and necessary in order to carry out the decree of this Court.

[This order also authorized the Special Master to employ clerical help; to fix times and places for taking evidence; to issue subpœnas to witnesses, including those of

his own selection, and to administer oaths. There were other provisions as to the printing and hearing of his report; as to the fixing and charging of his pay and allowances; and permitting another appointment by the CHIEF JUSTICE in case of a failure to accept or a vacancy during recess.]

Messrs. Henry N. Benson, Attorney General of Minnesota, *Gilbert Bettman,* Attorney General of Ohio, and *Raymond T. Jackson,* with whom *Messrs. John W. Reynolds,* Attorney General of Wisconsin, *Herbert H. Naujoks,* Assistant Attorney General, *Herman L. Ekern,* and *Paul W. Voorhies,* Attorney General of Michigan, were on the brief, for plaintiffs. *Messrs. William Rothmann* and *Joseph B. Fleming,* with whom *Messrs. Oscar E. Carlstrom,* Attorney General of Illinois, and *Frank Johnston, Jr.,* were on the brief, for defendants.

No. 15, original. WYOMING *v.* COLORADO. Motion submitted December 12, 1932. Decided December 19, 1932. [On consideration of the joint motion and stipulation of counsel for the respective parties in this cause, E. O. Whittington, Esq., is appointed Special Commissioner to take and return the testimony for the plaintiff; and J. Howard Carpenter, Esq., Special Commissioner to take and return the testimony offered by defendant. They are to have the powers of a Master, but not to make findings of fact or state conclusions of law. The order makes provision as to the time when the testimony shall be taken (to begin on April 3, 1933) and as to the pay and travel of the Commissioners.] *Mr. James A. Greenwood,* Attorney General of Wyoming, for plaintiff. *Mr. Clarence L. Ireland,* Attorney General of Colorado, for defendant.

No. 441. LEACH *v.* CALIFORNIA. Appeal from the Supreme Court of California. Jurisdictional statement submitted December 17, 1932. Decided January 9, 1933.

Per Curiam: The appeal herein is dismissed for the want of a substantial federal question. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539; *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559; *Merrick* v. *N. W. Halsey & Co.*, 242 U. S. 568; *Sloman* v. *Security Trust Co.*, 281 U. S. 704; *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 109; *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 18; *Sproles* v. *Binford*, 286 U. S. 374, 393. *Mr. Jesse I. Miller* for appellant. *Messrs. U. S. Webb* and *Tracy Chatfield Becker* for appellee. Reported below: 215 Cal. 536; 12 P. (2d) 3.

No. —, original. NEW JERSEY *v.* PENNSYLVANIA. Rule to show cause issued November 14, 1932. Return to rule presented December 19, 1932. Decided January 9, 1933. On consideration of the return to the rule to show cause it is ordered that the motion for leave to file the bill of complaint herein be, and the same hereby is, denied. *Messrs. Wm. A. Stevens*, Attorney General of New Jersey, *Duane E. Minard*, Assistant Attorney General, and *Wm. A. Moore* for complainant. *Messrs. Wm. A. Schnader*, Attorney General of Pennsylvania, and *Herman J. Goldberg*, Deputy Attorney General, for defendant.

No. —, original. EX PARTE LAMKIN ET AL. Motion submitted December 19, 1932. Decided January 9, 1933. Motion for leave to file petition for writ of mandamus denied. *Mr. Wm. R. Watkins* for petitioners.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 3, 1932, TO AND INCLUDING JANUARY 9, 1933.

No. 53. GREAT NORTHERN RY. CO. *v.* SUNBURST OIL & REFINING CO. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Montana granted.

Messrs. R. J. Hagman and *J. P. Plunkett* for petitioner. *Mr. George E. Hurd* for respondent. Reported below: 91 Mont. 216; 7 P. (2d) 927.

No. 63. DICKSON ET AL *v.* UHLMANN GRAIN CO. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. S. J. Jones* for petitioners. *Messrs. Paul R. Stinson, Arthur Mag,* and *Roy B. Thompson* for respondent. Reported below: 56 F. (2d) 525.

No. 82. COOK *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Edmund M. Toland* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour* and *A. W. Henderson* for the United States. Reported below: 56 F. (2d) 921.

No. 90. BAINBRIDGE *v.* MERCHANTS & MINERS TRANSPORTATION CO. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Pennsylvania granted. *Mr. Thomas D. McBride* for petitioner. *Mr. Howard H. Yocum* for respondent. Reported below: 306 Pa. 204; 159 Atl. 19.

No. 110. COSTANZO *v.* TILLINGHAST, U. S. COMMISSIONER. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. William H. Lewis* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *Albert E. Reitzel* for respondent. Reported below: 56 F. (2d) 566.

No. 131. AMERICAN SURETY Co. *v.* MAROTTA. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Harry LeBaron Sampson* for petitioner. *Mr. George I. Cohen* for respondent. Reported below: 57 F. (2d) 829.

No. 137. AETNA LIFE INSURANCE Co. ET AL. *v.* MOSES. October 10, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Charles W. Arth* and *Leonard J. Ganse* for petitioners. *Messrs. Merritt U. Hayden, H. Clay Espey,* and *James O'Donnell Moran* for respondent. Reported below: 61 App. D. C. 74; 57 F. (2d) 440.

No. 141. UNITED STATES *v.* FACTORS & FINANCE Co. October 10, 1932. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, George H. Foster, John A. Rees,* and *Wm. H. Riley, Jr.,* for the United States. *Mr. J. Gilmer Korner, Jr.,* for respondent. Reported below: 73 Ct. Cls. 707; 56 F. (2d) 902.

No. 147. HAWKS ET AL. *v.* HAMILL ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. J. Berry King* and *W. C. Lewis* for petitioners. *Messrs. Charles B. Cochran* and *Lessing Rosenthal* for respondents. Reported below: 58 F. (2d) 41.

No. 163. ATLANTIC CITY ELECTRIC Co. *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals

for the Second Circuit granted. *Mr. Graham Sumner* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. John Henry McEvers, J. P. Jackson,* and *Paul D. Miller* for respondent. Reported below: 57 F. (2d) 186.

No. 166. JOHNSON & HIGGINS OF CALIFORNIA *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Cletus Keating* and *Richard L. Sullivan* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, Charles F. Kincheloe, J. Frank Staley,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 74 Ct. Cls. 331.

No. 182. PINELLAS ICE & COLD STORAGE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Albert L. Hopkins, Jay C. Halls,* and *Harry B. Sutter* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Francis H. Horan* for respondent. Reported below: 57 F. (2d) 188.

No. 191. UNITED STATES *v.* ARZNER. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Thacher* for the United States. *Messrs. Samuel H. Williams* and *Stephen F. Chadwick* for respondent. Reported below: 57 F. (2d) 488.

No. 192. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* ALUMINUM GOODS MANUFACTURING CO. October

10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Wm. Cutler Thompson* for petitioner. *Messrs. Edwin S. Mack, J. Gilbert Hardgrove, Arthur W. Fairchild, Paul F. Myers,* and *Frederic Sammond* for respondent. Reported below: 57 F. (2d) 568.

No. 104. BANKERS POCAHONTAS COAL CO. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 105. STROTHER *v.* SAME. October 10, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Wells Goodykoontz* and *Camden R. McAtee* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Andrew D. Sharpe,* and *Erwin N. Griswold* for respondent. Reported below: 55 F. (2d) 626.

No. 177. SORRELLS *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted, limited to the question whether the evidence was sufficient to go to the jury upon the issue of entrapment. *Mr. A. Hall Johnston* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 57 F. (2d) 973.

No. 180. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* CLARK. October 10, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Thacher* for petitioner.

Mr. Wm. S. Hammers for respondent. Reported below: 61 App. D. C. 217; 59 F. (2d) 1031.

No. 234. UNITED STATES *v.* HENRY PRENTISS & Co., INC. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Thacher* for the United States. *Messrs. Joseph F. Murray* and *J. Arthur Mattson* for respondent. Reported below: 57 F. (2d) 676.

No. 314. FAIRMOUNT GLASS WORKS *v.* CUB FORK COAL CO. ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Henry H. Hornbrook* and *Paul Y. Davis* for petitioner. *Mr. C. W. Nichols* for respondents. Reported below: 59 F. (2d) 539.

No. 378. BURNS *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Otto Christensen* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 59 F. (2d) 721.

No. 308. UNITED STATES *v.* MEMPHIS COTTON OIL CO. October 17, 1932. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Thacher* for the United States. *Mr. Walter E. Barton* for respondent. Reported below: 75 Ct. Cls. 195; 59 F. (2d) 276.

No. 202. THIRD NATIONAL BANK & TRUST CO. ET AL., EXECUTORS, *v.* WHITE, COLLECTOR OF INTERNAL REVENUE.

October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Harold P. Small* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Wm. H. Riley, Jr.,* and *Miss Helen R. Carloss* for respondent. Reported below: 58 F. (2d) 1085.

No. 215. PALMER *v.* BENDER, ADMINISTRATRIX. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Henry P. Dart, Jr., Fred R. Angevine, John H. Tucker, Jr.,* and *Henry P. Dart* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, Andrew D. Sharpe,* and *Erwin N. Griswold* for respondent. Reported below: 57 F. (2d) 32.

No. 227. ROGERS *v.* GUARANTY TRUST CO. ET AL. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Evan Shelby* and *Richard Reid Rogers* for petitioner. *Messrs. John W. Davis, William M. Parke,* and *Nathan L. Miller* for respondents. Reported below: 60 F. (2d) 114.

Nos. 228 and 229. GEORGE A. OHL & CO. *v.* A. L. SMITH IRON WORKS. October 17, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Lee M. Friedman* and *Louis B. King* for petitioner. *Messrs. Lowell A. Mayberry* and *Robert Gallagher* for respondent. Reported below: 57 F. (2d) 44.

No. 272. NORWEGIAN NITROGEN PRODUCTS CO. *v.* UNITED STATES. October 17, 1932. Petition for writ of

certiorari to the Court of Customs & Patent Appeals granted. *Messrs. Marion DeVries, Jesse P. Crawford,* and *H. Kennedy McCook* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Mr. Robert P. Reeder* for the United States. Reported below: 20 C. C. P. A. (Cust.) 27.

No. 278. Fort Smith Suburban Ry. Co. et al. *v.* Kansas City Southern Ry. Co. October 17, 1932. Petition for writ of certiorari to the Supreme Court of Arkansas granted. *Messrs. Thomas B. Pryor* and *Edward J. White* for petitioners. *Messrs. Frank H. Moore, A. F. Smith, James B. McDonough, Wm. E. Davis,* and *Samuel W. Moore* for respondent. Reported below: 48 S. W. (2d) 225.

No. 283. Burnet, Commissioner of Internal Revenue, *v.* Guggenheim. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Attorney General Mitchell, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, Hayner N. Larson,* and *Erwin N. Griswold* for petitioner. *Messrs. Elihu Root, J. Harry Covington, Elihu Root, Jr.,* and *George E. Cleary* for respondent. Reported below: 58 F. (2d) 188.

No. 286. New York Central R. Co. *v.* The Talisman et al. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. D. Roger Englar, Leonard J. Matteson,* and *Clive C. Handy* for petitioner. *Mr. Chauncey I. Clark* for respondents. Reported below: 57 F. (2d) 144.

No. 304. New York *v.* Irving Trust Co., Trustee. October 17, 1932. Petition for writ of certiorari to the

Circuit Court of Appeals for the Second Circuit granted. *Mr. Robert P. Beyer* for petitioner. *Mr. S. John Block* for respondent. Reported below: 58 F. (2d) 980.

Nos. 316, 317, and 318. UNITED STATES *v.* DUBILIER CONDENSER CORP. October 17, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Alexander Holtzoff* and *Paul D. Miller* for the United States. *Messrs. James H. Hughes, Jr., John B. Brady,* and *E. Ennalls Berl* for respondent. Reported below: 59 F. (2d) 381.

No. 335. WILBUR, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. CHESTATEE PYRITES & CHEMICAL CORP. October 17, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Thacher* for petitioner. *Messrs. Marion Smith, Edgar Watkins, Mac Asbill,* and *Edgar Watkins, Jr.,* for respondent. Reported below: 61 App. D. C. 212; 59 F. (2d) 887.

No. 319. UNITED STATES *v.* ACME OPERATING CORP. ET AL. October 17, 1932. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Thacher* for the United States. *Messrs. Addison C. Burnham, Albert T. Gould, Charles H. Bradley, Walter B. Howe, Alfred P. Lowell,* and *John Walsh* for respondents. Reported below: 74 Ct. Cls. 82.

No. 346. UNION BANK & TRUST CO. *v.* PHELPS. October 17, 1932. Petition for writ of certiorari to the Supreme Court of Alabama granted. *Messrs. William B.*

White and *John S. Coleman* for petitioner. *Mr. Thomas E. Knight, Jr.*, for respondent. Reported below: 225 Ala. 238; 142 So. 552.

No. 359. ROCCO, EXECUTRIX, *v.* LEHIGH VALLEY R. Co. October 17, 1932. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. Clayton R. Lusk* and *Abraham W. Feinberg* for petitioner. *Messrs. Howard Cobb* and *Harold E. Simpson* for respondent. Reported below: 259 N. Y. 51; 181 N. E. 11.

No. 379. PENNSYLVANIA R. Co. *v.* CHAMBERLAIN, ADMINISTRATRIX. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Roscoe H. Hupper, Frederic D. McKenney,* and *Morton L. Fearey* for petitioner. *Mr. Sol Gelb* for respondent. Reported below: 59 F. (2d) 986.

No. 330. MCDONNELL *v.* UNITED STATES; and

No. 331. TRUDA *v.* SAME. October 24, 1932. Petitions for writs of certiorari to the Court of Claims granted limited to the question of the validity of the waiver under § 278(e) of the Revenue Act of 1924. *Mr. Robert Ash* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, H. Brian Holland,* and *Erwin N. Griswold* for the United States. Reported below: 75 Ct. Cls. 155, 186; 59 F. (2d) 290.

No. 364. ST. LOUIS SOUTHWESTERN RY. Co. *v.* MISSOURI PACIFIC R. Co. October 24, 1932. Petition for writ of certiorari to the Supreme Court of Arkansas granted. *Messrs. Harold R. Small* and *Arthur L. Adams* for petitioner. *Messrs. Robert E. Wiley* and *Edward J. White* for

respondent. Reported below: 185 Ark. 824; 49 S. W. (2d) 1054.

No. 374. NEW YORK *v.* MACLAY ET AL., RECEIVERS, ET AL. October 24, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Charles A. Schneider* and *Robert P. Beyer* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Hayner N. Larson,* and *Wm. H. Riley, Jr.,* for respondents. Reported below: 59 F. (2d) 979.

No. 388. SPICER *v.* SMITH, SPECIAL DEPUTY BANKING COMMISSIONER. October 24, 1932. Petition for writ of certiorari to the Court of Appeals of Kentucky granted. *Messrs. Wm. Marshall Bullitt, O. H. Pollard,* and *Leo T. Wolford* for petitioner. *Mr. Jesse I. Miller* for respondent. Reported below: 244 Ky. 68; 50 S. W. (2d) 64.

No. 393. FEDERAL TRADE COMMISSION *v.* ROYAL MILLING CO. ET AL. OCTOBER 24, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Thacher, Assistant to the Attorney General O'Brian,* and *Messrs. Whitney North Seymour, Wm. G. Davis, Robert E. Healy,* and *Martin A. Morrison* for petitioner. *Mr. Thomas H. Malone* for respondents. Reported below: 58 F. (2d) 581.

No. 423. LEVERING & GARRIGUES CO. ET AL. *v.* MORRIN ET AL. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted limited to the question of federal jurisdiction other than questions relating to diversity of citizenship.

Mr. Merritt Lane for petitioners. *Messrs. Frank P. Walsh* and *John Walsh* for respondents. Reported below: 61 F. (2d) 115.

No. 322. MASSACHUSETTS MUTUAL LIFE INSURANCE CO. *v.* UNITED STATES. November 7, 1932. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Guy Patten* and *A. R. Serven* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, L. A. Smith,* and *Bradley B. Gilman* for the United States. Reported below: 75 Ct. Cls. 117; 59 F. (2d) 116.

No. 407. MUNROE, RECEIVER, *v.* RAPHAEL. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. William P. Everts* for petitioner. *Mr. Mark M. Horblit* for respondent. Reported below: 60 F. (2d) 16.

No. 434. UNITED STATES *v.* DAKOTA-MONTANA OIL CO. November 14, 1932. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Thacher* for the United States. *Messrs. Herman J. Galloway* and *Louis P. Donovan* for respondent. Reported below: 75 Ct. Cls. 666; 59 F. (2d) 853.

No. 466. PORTER, EXECUTRIX, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. November 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Walter E. Hope* for petitioners. *Solicitor General Thacher* for respondent. Reported below: 60 F. (2d) 673.

No. 448. PETROLEUM EXPLORATION *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. November 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Robert Ash* for petitioner. *Solicitor General Thacher* for respondent. Reported below: 61 F. (2d) 273.

No. 315. VOEHL *v.* INDEMNITY INSURANCE CO. November 21, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Israel J. Mendelson* for petitioner. *Messrs. Frederic D. McKenney, John S. Flannery,* and *G. Bowdoin Craighill* for respondent. Reported below: 61 App. D. C. 173; 58 F. (2d) 1074.

No. 460. ANDERSON, COLLECTOR OF INTERNAL REVENUE, *v.* WILSON ET AL.; and

No. 461. WILSON ET AL. *v.* ANDERSON, COLLECTOR OF INTERNAL REVENUE. November 21, 1932. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Whitney North Seymour* and *Sewall Key,* and *Miss Helen R. Carloss* for Anderson, Collector. *Messrs. George E. Cleary* and *Clark T. Brown* for Wilson et al. Reported below: 60 F. (2d) 52.

No. 138. MILLER *v.* ADERHOLD, WARDEN. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Dean G. Acheson* and *Joseph F. Miller* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for respondent. Reported below: 56 F. (2d) 152.

No. 475. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* S. & L. BUILDING CORP. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John MacC. Hudson* for petitioner. *Messrs. Leo H. Hoffman* and *George W. Perper* for respondent. Reported below: 60 F. (2d) 719.

No. 469. VANCOUVER STEAMSHIP CO., INC., *v.* RICE, ADMINISTRATRIX. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Erskine Wood* for petitioner. *Mr. Arthur F. Moulton* for respondent. Reported below: 60 F. (2d) 793.

Nos. 476 and 477. HEINER, COLLECTOR OF INTERNAL REVENUE, *v.* DIAMOND ALKALI CO.; and

No. 478. LEWELLYN, FORMERLY COLLECTOR, *v.* SAME. December 5, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, Norman D. Keller, Paul D. Miller,* and *S. Dee Hanson* for petitioners. *Messrs. John W. Davis, Wm. A. Seifert, Maynard Teall,* and *Marion N. Fisher* for respondent. Reported below: 49 F. (2d) 120; 60 F. (2d) 505.

No. 492. PUERTO RICO *v.* RUSSELL & CO. ET AL. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Wm. Cattron Rigby, Fred W. Llewellyn, Charles E. Winter,* and *Blanton Winship* for petitioner. *Mr. Francis E. Neagle* for respondents. Reported below: 60 F. (2d) 10.

No. 496. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* BROOKS ET AL. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key* and *J. Louis Monarch* for petitioner. *Mr. Richard T. Greene* for respondents. Reported below: 60 F. (2d) 890.

No. 513. WILLIAMS, RECEIVER, *v.* BALTIMORE; and

No. 514. SAME *v.* ANNAPOLIS. December 5, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. George Weems Williams, William L. Rawls,* and *William L. Marbury, Jr.,* for petitioner. *Messrs. Lawrence B. Finneman, R. E. Lee Marshall,* and *Hestor J. Ciotti* for the City of Baltimore. *Mr. Roscoe C. Rowe* for the City of Annapolis. Reported below: 61 F. (2d) 374.

No. 356. INDIAN TERRITORY ILLUMINATING OIL CO. *v.* BOARD OF EQUALIZATION OF TULSA COUNTY. December 12, 1932. Petition for writ of certiorari to the Supreme Court of Oklahoma granted. *Messrs. John H. Miley* and *William P. McGinnis* for petitioner. *Mr. Hugh Webster* for respondent. Reported below: 159 Okla. 15; 13 P. (2d) 585.

No. 357. INDIAN TERRITORY ILLUMINATING OIL CO. *v.* BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY. December 12, 1932. Petition for writ of certiorari to the Supreme Court of Oklahoma granted. *Messrs. John H. Miley* and *William P. McGinnis* for petitioner. *Messrs. Ernest F. Jenkins* and *Guy L. Horton* for respondent. Reported below: 159 Okla. 6; 14 P. (2d) 929.

No. 534. SCRANTON ELECTRIC CO. *v.* COMMISSIONER OF INTERNAL REVENUE. December 12, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Graham Sumner* for petitioner. *Solicitor General Thacher* for respondent.

No. 518. PACIFIC COAST STEEL CO. *v.* MCLAUGHLIN, COLLECTOR OF INTERNAL REVENUE. January 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted, limited to the question of the effect of § 278 (e) of the Revenue Act of 1924. *Messrs. Ralph W. Smith* and *George H. Koster* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, J. P. Jackson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 61 F. (2d) 73.

No. 531. CLARK *v.* UNITED STATES. January 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Sigurd Ueland* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, W. Marvin Smith,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 61 F. (2d) 695.

No. 523. CENTRAL TRANSFER CO. *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS ET AL. January 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Glendy B. Arnold* for petitioner. *Messrs. C. S. Burg, H. H. Larrimore, Harold R. Small, Guy A. Thompson, Edw. J. White, E. T. Miller, O. H. Kiskaddon, M. G. Roberts, L. H. Strasser, Thos. W. White, J. M. Bryson,* and *T. M. Pierce* for respondents. Reported below: 61 F. (2d) 546.

No. 526. BALTIMORE & OHIO R. CO. ET AL. *v.* BRADY. January 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. George M. Hoffheimer, Charles R. Webber, Eugene S. Williams, E. A. Bowers,* and *William C. Purnell* for petitioners. *Messrs. George T. Bell* and *Samuel T. Spears* for respondent. Reported below: 61 F. (2d) 242.

No. 537. ARTHUR C. HARVEY CO. *v.* MALLEY ET AL. January 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. W. Walker Taylor* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, Francis H. Horan,* and *Paul D. Miller* for respondents. Reported below: 60 F. (2d) 97; 61 F. (2d) 365.

No. 538. BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS *v.* UNITED STATES. January 9, 1933. Petition for writ of certiorari to the Court of Customs and Patent Appeals granted. *Messrs. Sveinbjorn Johnson* and *Oscar E. Carlstrom* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Mr. Erwin N. Griswold* for the United States. Reported below: 20 C. C. P. A. (Cust.) 134.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 3, 1932, TO AND INCLUDING JANUARY 9, 1933.

No. 45. MILLER *v.* STATE BOARD OF DENTAL EXAMINERS ET AL. See same case, *ante,* p. 563.

No. 64. THOMAS ET AL. *v.* RABB. See same case, *ante,* p. 564.

No. 243. DUNNE *v.* MARYLAND. See same case, *ante*, p. 564.

No. 266. STEARNS, RECEIVER, ET AL. *v.* LORENZ ET AL. See same case, *ante*, p. 565.

No. 387. FOUTS ET AL. *v.* GEORGIA. See same case, *ante*, p. 569.

No. 136. HAWKS *v.* IOWA. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Iowa, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Henry Hawks, pro se.* No appearance for respondent. Reported below: 213 Iowa 698; 239 N. W. 553.

No. 201. SALISBURY *v.* SALISBURY. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Adele T. Salisbury, pro se.* No appearance for respondent.

No. 209. MORRIS *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Cedric F. Johnson* for petitioner. No appearance for the United States. Reported below: 61 App. D. C. 257; 61 F. (2d) 520.

No. 239. BEEBE *v.* MOORMACK GULF LINES, INC., ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis*, denied.

Mr. Marion Beebe, pro se. *Messrs. George H. Terriberry* and *Joseph M. Rault* for respondents. Reported below: 59 F. (2d) 319.

No. 294. POSNER *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Alan Fox* for petitioner. No appearance for the United States. Reported below: 60 F. (2d) 56.

No. 295. DENSMORE *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Edward Fitzpatrick* for petitioner. No appearance for the United States. Reported below: 58 F. (2d) 748.

No. 363. JOHNSON *v.* CALIFORNIA. October 10, 1932. Petition for writ of certiorari to the Appellate Division of the Superior Court of Los Angeles County, California, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Bruce B. Johnson, pro se.* *Messrs Erwin P. Werner* and *Frederick von Schrader* for respondent.

No. 371. BERG *v.* IOWA. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Iowa, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Fred Berg, pro se.* No appearance for respondent. Reported below: 242 N. W. 401.

No. 375. SWARZ *v.* LOEFFLER. October 10, 1932. Petition for writ of certiorari to the Appellate Court of Illi-

nois, First District, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. August Swarz, pro se.* No appearance for respondent. Reported below: 265 Ill. App. 602.

No. 89. PANTAZE ET AL., ADMINISTRATORS, *v.* MURPHY, TRUSTEE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Luther Nickels* for petitioners. No appearance for respondent. Reported below: 54 F. (2d) 895.

No. 107. FIDELITY UNION CASUALTY CO. *v.* HANSON ET AL. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Texas denied, upon the ground that the judgment sought here to be reviewed is joint and the record fails to disclose summons and severance. *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U. S. 169; *Capital National Bank* v. *Board of Supervisors,* 286 U. S. 550. *Mr. John Neethe* for petitioner. No appearance for respondents. Reported below: 26 S. W. (2d) 395; 44 S. W. (2d) 985.

No. 109. CHICAGO, BURLINGTON & QUINCY R. Co. *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Court of Claims denied. The motion to remand is also denied. *Messrs. George E. Hamilton* and *John F. McCarron* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, Louis R. Mehlinger,* and *Bradley B. Gilman* for the United States. Reported below: 73 Ct. Cls. 250.

No. 37. MCHARG *v.* GRIMES SAVINGS BANK. October 10, 1932. Petition for writ of certiorari to the Supreme

Court of Iowa denied. *Mr. Hiram S. Hunn* for petitioner. *Mr. John G. Myerly* for respondent. Reported below: 213 Iowa 969; 236 N. W. 418.

No. 47. UTAH IDAHO CENTRAL R. Co. *v.* SWANER. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. James H. DeVine* and *James A. Howell* for petitioner. No appearance for respondent. Reported below: 54 F. (2d) 863.

No. 50. UNION INDEMNITY CO. ET AL. *v.* FLORIDA BANK & TRUST CO. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. James A. Dixon, Frederick M. Hudson, Francis M. Miller,* and *John G. McKay* for petitioners. No appearance for respondent. Reported below: 55 F. (2d) 640.

No. 291. WOODWARD, RECEIVER, *v.* PENNSYLVANIA ET AL. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Russell Duane* for petitioner. No appearance for respondents. Reported below: 307 Pa. 485; 161 Atl. 738.

No. 54. CRILE *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Carmi A. Thompson* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Wm. Cutler Thompson,* and *Erwin N. Griswold* for respondent. Reported below: 55 F. (2d) 804.

No. 56. TEXAS GULF SULPHUR CO. ET AL. *v.* PORTLAND GAS LIGHT CO. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Forrest E. Single* for petitioners. *Mr. Carl C. Jones* for respondent. Reported below: 57 F. (2d) 801.

No. 59. CRANE ET AL. *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. Joseph M. Hartfield* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, Bradley B. Gilman,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 73 Ct. Cls. 677; 55 F. (2d) 734.

No. 60. EDDY'S STEAM BAKERY, INC. *v.* RASMUSSON, COLLECTOR OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. T. B. Weir* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Whitney North Seymour, Sewall Key, John G. Remey,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 57 F. (2d) 27.

No. 61. HEIDT *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Nat Louis Hardy* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson* and *Messrs. Whitney North Seymour* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 56 F. (2d) 559.

No. 62. PALMOLIVE CO. *v.* CONWAY ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court

of Appeals for the Seventh Circuit denied. *Messrs. Louis Quarles* and *Harry L. Butler* for petitioner. *Messrs. John W. Reynolds* and *Theodore W. Brazeau* for respondents. Reported below: 56 F. (2d) 83.

No. 65. HAYNES, TRUSTEE IN BANKRUPTCY, *v.* QUICKSILVER. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry C. Weeks* for petitioner. No appearance for respondent. Reported below: 56 F. (2d) 59.

No. 66. BARTLESVILLE ZINC CO. *v.* MILLS, DIRECTOR GENERAL OF RAILROADS. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harry C. Barnes* for petitioner. *Messrs. H. W. Davis, R. S. Outlaw, Sidney F. Andrews,* and *A. A. McLaughlin* for respondent. Reported below: 56 F. (2d) 154.

No. 67. FARMERS BANK *v.* HAYES ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. A. Fowler* for petitioner. *Mr. Thomas G. McConnell* for respondents. Reported below: 58 F. (2d) 34.

No. 68. BROWN *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. C. Murphy* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Francis H. Horan* for respondent. Reported below: 55 F. (2d) 1076.

No. 69. KANE, TRUSTEE IN BANKRUPTCY, ET AL. *v.* POTTORFF, RECEIVER, ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. H. Fryer* for petitioners. No appearance for respondents. Reported below: 56 F. (2d) 534.

No. 70. FARNUM *v.* PUBLIC UTILITIES COMMISSION OF RHODE ISLAND. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Rhode Island denied. *Mr. David Weiner* for petitioner. *Mr. Sigmund W. Fischer, Jr.,* for respondent. Reported below: 52 R. I. 128; 158 Atl. 713.

No. 71. McMULLIN *v.* GRAEBER ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Bentley M. McMullin, pro se.* No appearance for respondents. Reported below: 56 F. (2d) 497.

No. 72. McMULLIN *v.* MARTIN. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Bentley M. McMullin, pro se.* No appearance for respondent. Reported below: 56 F. (2d) 497.

No. 73. LIBERTY NATIONAL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Charles F. Miller* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John G. Remey* for respondent. Reported below: 58 F. (2d) 57.

No. 74. HIGGINS, TRUSTEE IN BANKRUPTCY, *v.* BRAINARD ET AL. October 10, 1932. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. John C. Altman* for petitioner. *Messrs. F. D. Madison, Alfred Sutro, H. D. Pillsbury, Oscar Sutro,* and *Felix T. Smith* for respondents. Reported below: 214 Cal. 647; 8 P. (2d) 135.

No. 75. VOGEL ET AL. *v.* NEW YORK LIFE INSURANCE CO. ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. P. McLean* for petitioners. No appearance for respondents. Reported below: 55 F. (2d) 205.

No. 76. PROVIDENT SAVINGS BANK & TRUST CO. *v.* SHELBY COUNTY, TEXAS. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. B. Hamilton* for petitioner. No appearance for respondent. Reported below: 54 F. (2d) 602.

No. 77. GOLDSTEIN, TRUSTEE IN BANKRUPTCY, *v.* RUSCH ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Benjamin I. Sperling* for petitioner. *Mr. Albert Blumenstill* for respondents. Reported below: 56 F. (2d) 10.

No. 78. EDWARDS *v.* JOHNSTON FORMATION TESTING CORP. ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. M. Streetman* for petitioner. No appearance for respondents. Reported below: 56 F. (2d) 49.

No. 79. PEABODY COAL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Albert L. Hopkins* and *Jay C. Halls* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, John H. McEvers,* and *W. Marvin Smith* for respondent. Reported below: 55 F. (2d) 7.

No. 83. CLAWANS *v.* WHITEFORD ET AL. October 10, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Benjamin M. Weinberg* for petitioner. No appearance for respondents. Reported below: 60 App. D. C. 412; 55 F. (2d) 1037.

No. 84. CLAWANS *v.* CARRICK ET AL. October 10, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Benjamin M. Weinberg* for petitioner. No appearance for respondents. Reported below: 60 App. D. C. 413; 55 F. (2d) 1038.

No. 85. HERTZMARK *v.* LYNCH, TRUSTEE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Benjamin F. Evarts* for petitioner. No appearance for respondent. Reported below: 54 F. (2d) 38.

No. 86. KRAMER *v.* GENERAL PAINT CORP. ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. A. J. Biddison* and *Harry Campbell* for petitioner.

Messrs. Preston C. West and *A. A. Davidson* for respondents. Reported below: 57 F. (2d) 698.

No. 87. GRAND TRUNK WESTERN RY. CO. *v.* CARPENTER, ADMINISTRATRIX. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Charles Y. Freeman* and *J. F. Dammann* for petitioner. *Mr. Joseph D. Ryan* for respondent.

No. 88. DICKEY ET AL., EXECUTORS, *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Maurice H. Winger* and *Alton Gumbiner* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John G. Remey* for respondent. Reported below: 56 F. (2d) 917.

No. 134. PARKER, EXECUTRIX, *v.* ROUTZAHN, COLLECTOR OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Carmi A. Thompson* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John MacC. Hudson* for respondent. Reported below: 56 F. (2d) 730.

No. 91. TEXAS & PACIFIC RY. CO. *v.* BALDWIN. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Texas denied. *Mr. T. D. Gresham* for petitioner. *Mr. Theodore Mack* for respondent. Reported below: 25 S. W. (2d) 969; 44 S. W. (2d) 909.

No. 93. SELF ET AL. *v.* NEW YORK LIFE INSURANCE CO. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Kenneth W. Coulter* and *Edward H. Coulter* for petitioners. *Messrs. Louis H. Cook, W. H. Rector,* and *A. F. House* for respondent. Reported below: 56 F. (2d) 364.

No. 94. CENTRAL RAILROAD CO. OF NEW JERSEY *v.* HALGES, ADMINISTRATRIX. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles E. Miller* for petitioner. *Messrs. Thomas J. O'Neill* and *Charles D. Lewis* for respondent. Reported below: 58 F. (2d) 169.

No. 101. UNITED STATES EX REL. YOKINEN *v.* COMMISSIONER OF IMMIGRATION. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Abraham J. Isserman* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour* and *Harry S. Ridgely* for respondent. Reported below: 57 F. (2d) 707.

No. 102. COMPANHIA DENAVEGACAO LLOYD BLASILEIRO *v.* ROYAL MAIL STEAM PACKET CO. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank J. McConnell* for petitioner. *Messrs. Van Vechten Veeder, Chauncey I. Clark,* and *A. Howard Neely* for respondent. Reported below: 55 F. (2d) 1082.

No. 103. R. H. MACY & CO., INC. *v.* DESIMONE. October 10, 1932. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Second Circuit denied. *Messrs. H. Dorsey Spencer* and *Cyril A. Soans* for petitioner. *Mr. Walter W Burns* for respondent. Reported below: 57 F. (2d) 179.

No. 106. VAN SENDEN ET AL. *v.* O'BRIEN ET AL., ADMINISTRATRICES. October 10, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Webster Ballinger* for petitioners. *Mr. George Francis Williams* for respondents. Reported below: 61 App. D. C. 137; 58 F. (2d) 689.

No. 108. BRAMPTON WOOLEN CO. *v.* FIELD, COLLECTOR OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Henry M. Ward* and *Harry A. Fellows* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Norman D. Keller* for respondent. Reported below: 56 F (2d) 23.

Nos. 111 and 112. MORAN TOWING & TRANSPORTATION CO., INC. *v.* P. SANFORD ROSS, INC., ET AL. October 10, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace L. Cheyney* for petitioner. *Messrs. John A. Garver* and *Horace M. Gray* for respondents. Reported below: 55 F. (2d) 1052.

No. 113. ROSENTHAL *v.* WEST DISINFECTING CO., INC. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas Raeburn White* and *George Wharton*

Pepper for petitioner. *Messrs. Thomas G. Haight* and *E. Clarkson Seward* for respondent. Reported below: 56 F. (2d) 320.

No. 114. OROVILLE-WYANDOTTE IRRIGATION DISTRICT *v.* RUTHERFORD. October 10, 1932. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Blair S. Shuman* and *Walter C. Fox, Jr.*, for petitioner. *Mr. Douglas Brookman* for respondent. Reported below: 215 Cal. 124; 8 P. (2d) 836. See also 2 P. (2d) 803.

No. 115. PERRY *v.* WIGGINS. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Paul Bakewell, Jr.*, for petitioner. *Mr. Daniel N. Kirby* for respondent. Reported below: 57 F. (2d) 622.

No. 116. WESTMORELAND SPECIALTY CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. George E. H. Goodner* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Wm. Cutler Thompson,* and *Erwin N. Griswold* for respondent. Reported below: 61 App. D. C. 95; 57 F. (2d) 615.

No. 117. MCCLURE, ADMINISTRATOR, *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George E. H. Goodner* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whit-*

ney North Seymour, Sewall Key, Norman D. Keller, and *Erwin N. Griswold* for respondent.

No. 118. National Mortgage & Investment Co. *v.* Quinn et al., Receivers. October 10, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Benjamin S. Minor, H. Prescott Gatley,* and *Arthur P. Drury* for petitioner. *Messrs. W. Gwynn Gardiner* and *South Trimble, Jr.,* for respondents. Reported below: 61 App. D. C. 44; 57 F. (2d) 410.

No. 119. Missouri Pacific R. Co. *v.* Harville. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Edward J. White* and *Thomas B. Pryor* for petitioner. *Mr. Will Harville, pro se.* Reported below: 185 Ark. 47; 46 S. W. (2d) 17.

No. 120. Missouri Pacific R. Co. *v.* Jonas. October 10, 1932. Petition for writ of certiorari to the Kansas City Court of Appeals of Missouri denied. *Mr. Roy W. Rucker* for petitioner. *Mr. William S. Hogsett* for respondent. Reported below: 48 S. W. (2d) 123.

No. 121. Baltimore & Ohio R. Co. et al. *v.* Baker, U. S. District Judge. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. George M. Hoffheimer, Charles R. Webber, Eugene L. Williams,* and *E. A. Bowers* for petitioners. *Messrs. George T. Bell* and *Samuel T. Spears* for respondent. Reported below: 58 F. (2d) 627.

No. 122. ONE BUICK SEDAN ET AL. *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Nathan Boone Williams* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller* and *Mahlon D. Kiefer* for the United States. Reported below: 61 App. D. C. 165; 58 F. (2d) 891.

No. 124. FIRST NATIONAL BANK ET AL. *v.* HARRISON COUNTY ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William J. Donovan, Ellsworth C. Alvord,* and *Harry L. Robertson* for petitioners. *Messrs. George S. Wright* and *Addison G. Kistle* for respondents. Reported below: 57 F. (2d) 56.

No. 125. DUFFIN *v.* LUCAS, FORMERLY COLLECTOR OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Elwood Hamilton* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, John H. McEvers,* and *Erwin N. Griswold* for respondent. Reported below: 55 F. (2d) 786.

No. 126. TAMIAMI INVESTMENT CO. *v.* BERK. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George E. Alter* for petitioner. No appearance for respondent. Reported below: 57 F. (2d) 1034.

No. 127. MCCLELLAN *v.* CALIFORNIA. October 10, 1932. Petition for writ of certiorari to the District Court of Ap-

peal, 1st Appellate District, of California, denied. *Mr. Robert B. McClellan, pro se. Messrs. U. S. Webb* and *Charles A. Wetmore, Jr.*, for respondent. Reported below: 119 Cal. App. 535; 6 P. (2d) 994.

No. 129. MUELLER *v.* UNITED STATES. October 10 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bart A. Riley* for petition. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Raymond S. Norris, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 56 F. (2d) 1084.

No. 130. PAN AMERICAN PETROLEUM CO. *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. S. M. Haskins* and *Norman S. Sterry* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson,* and *Messrs. Atlee Pomerene, Thomas M. Kirby,* and *Frank Harrison* for the United States. Reported below: 55 F. (2d) 753.

No. 132. NEW ENGLAND TRUST CO. *v.* FARR ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Edward C. Stone* for petitioner. *Mr. John G. Palfrey* for respondents. Reported below: 57 F. (2d) 103.

No. 133. PEYTONA LUMBER CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. F. M. Livezey* for petitioner. *Solici-*

tor General Thacher, Assistant Attorney General Youngquist, and *Messrs. Whitney North Seymour, Sewall Key, John MacC. Hudson,* and *Erwin N. Griswold* for respondent. Reported below: 55 F. (2d) 27.

No. 139. S. A. Woods Machine Co. *v.* Commissioner of Internal Revenue. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Paxton Blair* and *Henry H. Dinneen* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Francis H. Horan* for respondent. Reported below: 57 F. (2d) 635.

No. 140. St. Louis-San Francisco Ry. Co. *v.* Holt, Administratrix. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. M. K. Cruce, Alexander P. Stewart, Edward T. Miller,* and *Ben Franklin* for petitioner. *Mr. O. A. Cargill* for respondent. Reported below: 156 Okla. 135; 11 P. (2d) 761.

No. 142. Memphis Union Station Co. et al. *v.* Hartman, Judge. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Thomas J. Cole, Edward J. White,* and *John W. Canada* for petitioners. *Mr. Wm. H. Douglass* for respondent.

No. 143. Consolidated Indemnity & Insurance Co. *v.* W. A. Smoot & Co., Inc., et al. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. P. J. J. Nicolaides* for petitioner. *Mr. Bynum E. Hinton* for respondents. Reported below: 57 F. (2d) 995.

Nos. 144 and 145. LEWIS *v.* INGRAM. October 10, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. R. Emmett Stewart* and *J. Bernard Smith* for petitioner. *Mr. Charles A. Chandler* for respondent. Reported below: 57 F. (2d) 463.

No. 146. ALTEMUS ET AL. *v.* TALMADGE, EXECUTOR. October 10, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Bion B. Libby, William W. Bride, J. Miller Kenyon,* and *Robert E. Lynch* for petitioners. *Messrs. Clarence E. Dawson* and *George D. Horning, Jr.,* for respondent. Reported below: 61 App. D. C. 148; 58 F. (2d) 874.

No. 148. BABCOCK ET AL. *v.* CHICAGO RAILWAYS CO. ET AL.;

No. 149. TYLER ET AL. *v.* SAME; and

No. 150. RILEY ET AL. *v.* SAME. October 10, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Herbert Pope* and *Frank E. Harkness* for Babcock and Tyler et al. *Mr. Amos C. Miller* for Riley et al. *Messrs. Horace Kent Tenney, Henry F. Tenney, David O. Dunbar, Edwin H. Cassels, Harold Smith,* and *Sidney C. Murray* for respondents. Reported below: 56 F. (2d) 942.

No. 151. ROSSLYN STEEL & CEMENT CO. ET AL. *v.* ETCHISON ET AL. October 10, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Dale D. Drain, H. Winship Wheatley,* and *Norman Fischer* for petitioners. *Mr. Frederic D. McKenney* for respondents. Reported below: 61 App. D. C. 43; 57 F. (2d) 409.

No. 152. THE BLUE DIAMOND CO., INC. *v.* CHARLES M. ALLEN & SON, INC. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John S. Stone* for petitioner. No appearance for respondent. Reported below: 56 F. (2d) 1.

No. 153. TRADEMENS NATIONAL BANK *v.* MIDLAND SAVINGS & LOAN CO. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Claude Nowlin, J. R. Spielman,* and *M. M. Thomas* for petitioner. *Messrs. J. H. Everest, M. W. McKenzie,* and *J. B. Dudley* for respondent. Reported below: 57 F. (2d) 686.

No. 154. YATES-AMERICAN MACHINE CO. *v.* JURY, TRUSTEE IN BANKRUPTCY. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Howard M. Bingaman* for petitioner. *Mr. Frank E. Tressler* for respondent. Reported below: 56 F. (2d) 831.

No. 155. AMERICAN VISCOSE CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs Lee I. Park, Robert T. McCracken,* and *Charles D. Hamel* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John H. McEvers* for respondent. Reported below: 56 F. (2d) 1033.

No. 156. MICHEL *v.* SOLIMINE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals

for the Second Circuit denied. *Mr. Abraham Wilson* for petitioner. *Mr. Leo J. Linder* for respondent. Reported below: 56 F. (2d) 15.

No. 157. CONTINENTAL OIL CO. *v.* OSAGE OIL & REFINING CO. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Chester I. Long, Peter Q. Nyce, Ray S. Fellows, D. A. Richardson, Wm. H. Zurick,* and *Samuel D. McIntosh* for petitioner. *Messrs. J. E. Whitehead, W. F. Wilson,* and *R. E. Owens* for respondent. Reported below: 57 F. (2d) 527.

No. 305. CONTINENTAL OIL CO. *v.* OSAGE OIL & REFINING CO. ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Chester I. Long, David A. Richardson, Samuel W. McIntosh, Ray S. Fellows, Peter Q. Nyce,* and *Wm. H. Zurick* for petitioners. No appearance for respondents. Reported below: 57 F. (2d) 527.

No. 159. RORICK ET AL. *v.* CENTRAL FARMERS TRUST CO., TRUSTEE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Harold W. Fraser* and *Bert Winters* for petitioners. No appearance for respondent. Reported below: 57 F. (2d) 664.

Nos. 160 and 161. AMERICAN SURETY CO. *v.* SANTA BARBARA ET AL. October 10, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William C. Mathes* for petitioner.

Mr. Norman A. Bailie for respondents. Reported below: 56 F. (2d) 769.

No. 162. CLIFT & GOODRICH, INC. *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Osmond K. Fraenkel* and *Joseph M. Hartfield* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Hayner D. Larson,* and *W. Marvin Smith* for the United States. Reported below: 56 F. (2d) 751.

No. 164. CENTRAL RAILROAD COMPANY OF NEW JERSEY *v.* MILLER, ADMINISTRATRIX. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles E. Miller* for petitioner. *Mr. Sol Gelb* for respondent. Reported below: 58 F (2d) 635.

No. 165. SOUTHERN SURETY CO. ET AL. *v.* MACMILLAN CO. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. R. C. Allen, Ira J. Underwood,* and *Paul Pinson* for petitioners. *Mr. John Tomerlin* for respondent. Reported below: 58 F. (2d) 541.

No. 167. N. O. NELSON MFG. CO. *v.* F. E. MYERS & BRO. CO. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John L. Jackson* and *John A. Dienner* for petitioner. *Messrs. H. A. Toulmin* and *H. A. Toulmin, Jr.,* for respondent. Reported below: 56 F. (2d) 512.

No. 168. BROWN ET AL. *v.* MAYER ET AL.; and

No. 169. SAME *v.* MAGNOLIA PETROLEUM CO. October 10, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Roscoe Cox* for petitioners. No appearance for respondents. Reported below: 58 F. (2d) 48.

No. 170. INVESTORS SYNDICATE *v.* WILLCUTS, COLLECTOR OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. A. W. Clapp* and *Henry M. Isaacs* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Francis H. Horan* for respondent. Reported below: 57 F. (2d) 811.

No. 172. STUMPF *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles S. Stumpf, pro se. Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 57 F. (2d) 1084.

No. 173. SWENSON, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Mark McGee* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Wm. Cutler Thompson* for respondent. Reported below: 56 F. (2d) 544.

No. 174. CLARKE ET AL. *v.* HOT SPRINGS ELECTRIC LIGHT & POWER CO. ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Wm. J. Hughes, Jr.*, and *O. Ellery Edwards* for petitioners. No appearance for respondents. Reported below: 55 F. (2d) 612.

No. 175. HOWARD *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harry C. Howard* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Hayner N. Larson,* and *Wm. H. Riley, Jr.*, for respondent. Reported below: 56 F. (2d) 781.

No. 178. SCOTT, TRUSTEE, *v.* HAMILTON NATIONAL BANK; and

No. 179. SAME *v.* CHATTANOOGA FINANCE CO. October 10, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James H. Anderson* for petitioner. *Mr. John H. Cantrell* for the Hamilton National Bank. *Mr. J. B. Sizer* for the Chattanooga Finance Co. Reported below: 58 F. (2d) 912.

No. 181. BRADY *v.* WABASH RY. CO. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. John S. Marsalek* and *William H. Allen* for petitioner. *Messrs. W. H. Woodward* and *Homer Hall* for respondent. Reported below: 329 Mo. 1123; 49 S. W. (2d) 24.

No. 183. STONE & DOWNER CO. ET AL. *v.* UNITED STATES. October 10, 1932. Petition for writ of certiorari

to the Court of Customs and Patent Appeals denied. *Mr. Edward P. Sharrette* for petitioners. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Mr. Robert P. Reeder* for the United States. Reported below: 19 C. C. P. A. (Cust.) 259; 56 F. (2d) 892.

No. 184. MOFFAT TUNNEL IMPROVEMENT DISTRICT ET AL. *v.* BOYNTON ET AL. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Erskine R. Myer* and *Norton Montgomery* for petitioners. *Messrs. John A. Garver, Porter R. Chandler, Gerald Hughes, James M. Ogden, Clayton C. Dorsey,* and *John W. Davis* for respondents. Reported below: 57 F. (2d) 772.

No. 185. MISSOURI-KANSAS-TEXAS R. CO. *v.* DEMARAY, ADMINISTRATRIX. October 10, 1932. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Joseph M. Bryson, Carl S. Hoffman,* and *Charles S. Burg* for petitioner. *Mr. William S. Hogsett* for respondent. Reported below: 50 S. W. (2d) 127.

No. 186. NEWTOWN CREEK TOWING CO. *v.* BALDWIN. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward Ash* for petitioner. *Messrs. William F. Purdy* and *Edmund F. Lamb* for respondent. Reported below: 58 F. (2d) 174.

No. 187. HALSEY ET AL. *v.* WINANT ET AL. October 10, 1932. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Carroll G. Walter* for petitioners. *Mr. Martin Conboy* for respondents. Reported

below: 233 App. Div. 103, 251 N. Y. S. 81; 258 N. Y. 574, 180 N. E. 338.

No. 188. American Automobile Insurance Co. *v.* Benedetto et al. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Conover English* for petitioner. *Mr. Frank G. Turner* for respondents. Reported below: 58 F. (2d) 918.

No. 189. Marshall *v.* Commissioner of Internal Revenue. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas O. Marlar* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, John MacC. Hudson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 57 F. (2d) 633.

No. 190. Spurway, Receiver, *v.* Lehman, Sheriff. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. A. Coulter Wells* and *Charles R. Pierce* for petitioner. No appearance for respondent. Reported below: 58 F. (2d) 227.

No. 193. New York Trap Rock Corp. *v.* Long Island R. Co. et al. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick W. Park* for petitioner. *Messrs. Chauncey I. Clark* and *Frederic Conger* for respondents. Reported below: 59 F. (2d) 198.

No. 195. Atchison, Topeka & Santa Fe Ry. Co. *v.* Moran, Administratrix. October 10, 1932. Petition for

writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Cyrus Crane, Geo. J. Mersereau, S. J. Jones,* and *E. E. McInnis* for petitioner. *Mr. John T. Barker* for respondent. Reported below: 48 S. W. (2d) 881.

No. 196. U. S. Fidelity & Guaranty Co. *v.* Bassinger. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Daniel W. Livingston* and *Roland Max Anderson* for petitioner. No appearance for respondent. Reported below: 58 F. (2d) 573.

No. 197. Hutto *v.* Atlantic Life Insurance Co. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. W. C. Wolfe* for petitioner. *Messrs. Alva M. Lumpkin* and *Andrew D. Christian* for respondent. Reported below: 58 F. (2d) 69.

No. 198. Jenkins *v.* United States. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Julian C. Ryer* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller* and *W. Marvin Smith* for the United States. Reported below: 58 F. (2d) 556.

No. 200. U. S. Industrial Alcohol Co. *v.* Calmar Steamship Corp. October 10, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. D. Roger Englar* and *Henry N. Longley* for petitioner. *Mr. O. D. Duncan* for respondent. Reported below: 57 F. (2d) 182.

No. 417. REED *v.* OCCIDENTAL BUILDING & LOAN ASSN. ET AL. October 17, 1932. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *Gertrude D. Reed, pro se.* No appearance for respondents. Reported below: 122 Neb. 817; 241 N. W. 769.

No. 236. WILSON ET AL. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Husty* v. *United States,* 282 U. S. 694, 702; *David* v. *United States,* 283 U. S. 859. *Messrs. John J. Bouhan* and *E. H. Abrahams* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 59 F. (2d) 1.

No. 203. PHILIP CAREY MFG. CO. *v.* DEAN, FORMER COLLECTOR. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward J. Brunenkant* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Norman D. Keller,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 58 F. (2d) 737.

No. 204. SCHEURHOLZ *v.* ROACH. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. M. J. Fulton* and *Holmes Hall* for petitioner. *Mr. S. L. Sinnott* for respondent. Reported below: 58 F. (2d) 32.

No. 205. ANSARDI *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Herve Racivitch*

for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Leslie E. Salter* and *Paul D. Miller* for the United States. Reported below: 57 F. (2d) 1071.

No. 206. THORM ET AL. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. P. J. McCumber* and *Frederic M. P. Pearse* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 59 F. (2d) 419.

No. 207. MAGINNIS ET AL. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. William A. Hines* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Charles F. Kincheloe, Paul D. Miller,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 74 Ct. Cls. 668.

No. 208. YASUJI FUJITA *v.* NAGLE, COMMISSIONER OF IMMIGRATION. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Warren H. Lewis* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *W. Marvin Smith* for respondent. Reported below: 58 F. (2d) 184.

No. 210. LA SALLE CEMENT CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE; and

No. 211. ALPHA PORTLAND CEMENT CO. *v.* SAME. October 17, 1932. Petition for writs of certiorari to the Cir-

cuit Court of Appeals for the Seventh Circuit denied. *Mr. Louis H. Porter* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, John H. McEvers, Paul D. Miller,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 59 F. (2d) 361.

No. 212. UNITED STATES *v.* MILLER ET AL. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Solicitor General Thacher, Assistant Attorney General Richardson,* and *Messrs. Whitney North Seymour* and *Nat M. Lacy* for the United States. *Mr. V. P. Crowe* for respondents. Reported below: 57 F. (2d) 987.

No. 213. UNITED STATES *v.* MILLER ET AL. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Solicitor General Thacher* for the United States. *Mr. V. P. Crowe* for respondents. Reported below: 57 F. (2d) 987.

No. 214. UNITED STATES *v.* MILLER. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Solicitor General Thacher* for the United States. *Mr. V. P. Crowe* for respondent. Reported below: 57 F. (2d) 987.

No. 216. RUST ENGINEERING CO. *v.* CHAPMAN-STEIN CO. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied.

Messrs. C. P. Byrnes, Geo. E. Stebbins, and *Thomas G. Haight* for petitioner. *Mr. J. Austin Stone* for respondent. Reported below: 57 F. (2d) 38.

No. 219. LEHMAN *v.* TAIT, COLLECTOR. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. David J. Shorb* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Francis H. Horan,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 58 F. (2d) 20.

Nos. 221, 222, and 223. JENSEN ET AL. *v.* NEW YORK LIFE INSURANCE CO. October 17, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. F. E. Edgerton* for petitioners. *Messrs. Charles M. Blackmar* and *Louis H. Cooke* for respondent. Reported below: 59 F. (2d) 957. See also 50 F. (2d) 512.

No. 224. LEHIGH STRUCTURAL STEEL CO. *v.* RUST ENGINEERING CO. October 17, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. H. Winship Wheatley* for petitioner. *Mr. Ralph B. Fleharty* for respondent. Reported below: 61 App. D. C. 224; 59 F. (2d) 1038.

No. 225. OHIO EX REL. MILLIKAN *v.* COOK, CLERK. October 17, 1932. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. John Boyle, Jr.,* for petitioner. *Messrs. Andrew Squire* and *James R. Garfield* for respondent. Reported below: 41 Ohio App. 149, 180 N. E. 554; 125 Ohio St. 206, 180 N. E. 896.

No. 226. WABASH RY. CO. *v.* JARRETT. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clifton P. Williamson* for petitioner. *Mr. Samuel Brenner* for respondent. Reported below: 57 F. (2d) 669.

No. 230. FLYNN *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. T. F. Quinn* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Raymond S. Norris, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 57 F. (2d) 1044.

No. 232. MCCORMICK ET AL. *v.* EAST COAST ENTERPRISES, INC. ET AL. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Winfield P. Jones* for petitioners. *Messrs. H. P. Adair* and *John P. Stokes* for respondents. Reported below: 57 F. (2d) 859.

No. 233. GLIWA ET AL. *v.* U. S. STEEL CORP. ET AL. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. L. Pinkasiewicz* for petitioners. *Mr. Edwin W. Smith* for respondents. Reported below: 58 F. (2d) 920.

No. 235. KENNEY *v.* NORTH CAPITOL SAVINGS BANK. October 17, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Francis W. Hill, Jr.,* for petitioner. *Messrs. Joseph A. Burkart* and *Henry I. Quinn* for respondent. Reported below: 61 App. D. C. 258; 61 F. (2d) 521.

No. 237. JENKINS ET AL. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. John J. Bouhan* and *E. H. Abrahams* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 59 F. (2d) 2.

No. 240. ERIE R. Co. *v.* HEALY, ADMINISTRATOR. October 17, 1932. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Herbert A. Taylor* for petitioner. *Mr. Louis L. Waters* for respondent. Reported below: 233 App. Div. 147, 251 N. Y. S. 414; 259 N. Y. 40, 180 N. E. 888.

No. 241. BLANDAMER *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Charles Henry Butler, George J. Puckhafer,* and *John A. Kratz* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Mr. Robert P. Reeder* for the United States. Reported below: 20 C. C. P. A. (Cust.) 45.

No. 261. S. LEON & Co. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Thomas M. Lane* and *Samuel Isenschmid* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Mr. Robert P. Reeder* for the United States. Reported below: 20 C. C. P. A. (Cust.) 49.

No. 262. FOX RIVER BUTTER Co. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the

Court of Customs and Patent Appeals denied. *Mr. Howard T. Walden* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Mr. Robert P. Reeder* for the United States. Reported below: 20 C. C. P. A. (Cust.) 38.

No. 242. WEBSTER *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank P. Walsh* for petitioner. *Solicitor General Thacher* and *Messrs. Paul D. Miller, Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 59 F. (2d) 583.

No. 244. FRANKLIN ET AL. *v.* DELANEY. October 17, 1932. Petition for writ of certiorari to the Appellate Court of Illinois, First District, denied. *Mr. Louis H. Strasser* for petitioners. No appearance for respondent. Reported below: 264 Ill. App. 618.

No. 245. PROCTER & GAMBLE MFG. CO. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Benjamin A. Levett* and *Frederic R. Coudert* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Messrs. Robert P. Reeder* and *Wm. H. Futrell* for the United States. Reported below: 19 C. C. P. A. (Cust.) 415.

No. 246. ORABONA *v.* CLARK, IMMIGRATION INSPECTOR. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Benjamin Gianciarulo* for petitioner. *Solicitor General*

Thacher and *Messrs. Paul D. Miller, Harry S. Ridgely,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 59 F. (2d) 187.

No. 247. HUGHSON *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward I. Barry* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, Paul D. Miller, Wm. H. Riley, Jr.,* and *Miss Helen R. Carloss* for the United States. Reported below: 59 F. (2d) 17.

No. 248. LAFATCHA ET AL. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Jonathan Taylor* and *Charles Schnee* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, Mahlon D. Kiefer,* and *Erwin N. Griswold* for the United States.

No. 249. ROYAL MAIL STEAM PACKET CO. *v.* FRANKLIN FIRE INSURANCE CO. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. G. Noyes Slayton* for petitioner. *Mr. Forest E. Single* for respondent. Reported below: 58 F. (2d) 175.

No. 250. LOGAN *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Ralph A. Barney* and *Clarence Lohman* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson,* and *Messrs. Erwin N. Griswold* and *Nat M. Lacy* for the United States. Reported below: 58 F. (2d) 697.

Nos. 251 and 252. SMITH *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry E. Kahn* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller* and *Mahlon D. Kiefer* for the United States. Reported below: 58 F. (2d) 735.

No. 255. IHRIE *v.* REICHELDERFER ET AL. October 17, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. George C. Gertman* for petitioner. *Messrs. William W. Bride, Vernon E. West,* and *Francis H. Stephens* for respondents. Reported below: 61 App. D. C. 198; 59 F. (2d) 873.

No. 256. WINNE ET AL., RECEIVERS, *v.* SILBERBERG. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Merritt Lane* for petitioners. *Mr. Samuel Kaufman* for respondent. Reported below: 58 F. (2d) 766.

No. 257. R. L. HEFLIN, INC. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. Wm. S. Hammers* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Erwin N. Griswold* for the United States. Reported below: 74 Ct. Cls. 741; 58 F. (2d) 482.

No. 258. JOHNSON *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Herman L. Arterberry* for petitioner. *Solicitor General Thacher* and

Messrs. Neil Burkinshaw, Paul D. Miller, and *Erwin N. Griswold* for the United States. Reported below: 59 F. (2d) 42.

No. 263. Loiza Sugar Co. *v.* Porto Rico. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. David A. Buckley, Jr.,* for petitioner. *Messrs. Wm. Cattron Rigby, Fred W. Llewellyn, Charles E. Winter,* and *Blanton Winship* for respondent. Reported below: 57 F. (2d) 705.

No. 265. Warner *v.* Tennessee Products Corp. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John Boyle, Jr.,* for petitioner. *Mr. S. E. Darby* for respondent. Reported below: 57 F. (2d) 642.

No. 267. Tracy *v.* Commissioner of Internal Revenue; and

No. 268. Huron Building Co. *v.* Same. October 17, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George D. Welles* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *J. P. Jackson* for respondent. Reported below: 53 F. (2d) 575.

No. 269. Simon *v.* United States. October 17, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. Frederic C. Scofield* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, Melville Church,* and *Bradley B. Gilman* for the United States. Reported below: 73 Ct. Cls. 1.

No. 270. NATIONAL SHIRT SHOPS, INC., *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Wm. E. Leahy* and *Wm. J. Hughes, Jr.*, for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Erwin N. Griswold* for the United States. Reported below: 74 Ct. Cls. 653; 57 F. (2d) 925.

No. 271. MISSOURI EX REL. LOUISVILLE & NASHVILLE R. Co. *v.* HARTMAN, JUDGE. October 17, 1932. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Harold L. Small* for petitioner. *Messrs. Charles L. Moore* and *William H. Allen* for respondent.

No. 273. JORDAN *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Ernest L. Merrill* for petitioner. *Solicitor General Thacher* and *Messrs. Paul D. Miller* and *Erwin N. Griswold* for the United States. Reported below: 60 F. (2d) 4.

No. 274. LOUISVILLE & NASHVILLE R. Co. *v.* REVERMAN, ADMINISTRATRIX. October 17, 1932. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Mr. Frank M. Tracy* for petitioner. *Messrs. Robert C. Simmons* and *Richard T. Van Hoene* for respondent. Reported below: 243 Ky. 702; 49 S. W. (2d) 558.

No. 275. DETROIT FIDELITY & SURETY Co. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Warren E. Miller* for petitioner. *Solicitor*

General Thacher, Assistant Attorney General Youngquist, and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 59 F. (2d) 565.

No. 276. E. W. Bliss Co. *v.* United States. October 17, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. John M. Perry* and *George E. Hamilton* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Charles F. Kincheloe, Erwin N. Griswold,* and *Wm. W. Scott* for the United States. Reported below: 74 Ct. Cls. 14.

No. 277. Central Florida Lumber Co. *v.* Gray, Secretary of State. October 17, 1932. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Martin Sack* for petitioner. No appearance for respondent. Reported below: 104 Fla. 446; 140 So. 320; 141 So. 604.

No. 279. Parks & Woolson Machine Co. *v.* United States. October 17, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. Frank J. Albus* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Charles F. Kincheloe, Paul D. Miller,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 75 Ct. Cls. 204; 58 F. (2d) 868.

No. 280. Missouri Pacific R. Co. *v.* Remel. October 17, 1932. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Thomas B. Pryor* and *Edward J. White* for petitioner. *Messrs. Frank Pace* and *Tom W. Campbell* for respondent. Reported below: 185 Ark. 598; 48 S. W. (2d) 548.

No. 281. ELLIS *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. D. Haden Linebaugh* for petitioner. *Solicitor General Thacher* and *Messrs. Paul D. Miller, Harry S. Ridgely,* and *Wm. H. Riley Jr.,* for the United States. Reported below: 57 F. (2d) 502.

No. 284. FOOSHEE ET AL. *v.* SNAVELY. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. John L. Abbot* and *R. L. Fooshee* for petitioners. *Mr. Harvey B. Apperson* for respondent. Reported below: 58 F. (2d) 774.

No. 287. DRESSER ET AL., ADMINISTRATORS, *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Robert B. Dresser* and *Joseph Fairbanks* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Charles F. Kincheloe, Fred K. Dyar,* and *Erwin N. Griswold* for the United States. Reported below: 74 Ct. Cls. 55; 55 F. (2d) 499.

No. 288. SOUTHERN RY. CO. *v.* WILKINS, ADMINISTRATRIX. October 17, 1932. Petition for writ of certiorari to the Appellate Court of Indiana denied. *Messrs. Sidney S. Alderman, H. O'B. Cooper, John D. Welman,* and *S. R. Prince* for petitioner. *Mr. T. Morton McDonald* for respondent. Reported below: 178 N. E. 454.

No. 289. MORING *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Theodore Mack*

for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Leslie E. Salter, Paul D. Miller,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 58 F. (2d) 623.

No. 290. HEALDTON OIL & GAS CO. *v.* ALEXANDER, COLLECTOR. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. John E. Hughes* and *William Cogger* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, Hayner D. Larson, Paul D. Miller,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 59 F. (2d) 1064.

No. 292. REDWINE *v.* KNOX ET AL. October 17, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. W. B. O'Connell* for petitioner. *Mr. Alfred D. Smith* for respondents. Reported below: 61 App. D. C. 179; 59 F. (2d) 304.

No. 296. BENJAMIN CARROLL TABER *v.* UNITED STATES; and

No. 297. EDWARD CARROLL TABER *v.* SAME. October 17, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. Hollingsworth* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, J. P. Jackson, Paul D. Miller,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 59 F. (2d) 568.

No. 298. FIRST NATIONAL BANK *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals

for the Tenth Circuit denied. *Messrs. Camden R. McAtee* and *Phil D. Morelock* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, John H. McEvers,* and *Erwin N. Griswold* for respondent. Reported below: 57 F. (2d) 7.

No. 300. MARINOVICH *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George K. Bowden* for petitioner. *Solicitor General Thacher* for the United States.

No. 302. LUSTER ET AL., EXECUTORS, *v.* MARTIN ET AL. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Walter H. Jacobs* and *George T. Evans* for petitioners. *Mr. Charles S. Babcock* for respondents. Reported below: 58 F. (2d) 537.

No. 303. GRADWOHL *v.* WILLCUTS, COLLECTOR OF INTERNAL REVENUE. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Arnold R. Baar* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch, Andrew D. Sharpe,* and *Erwin N. Griswold* for respondent. Reported below: 58 F. (2d) 587.

No. 306. FORAN *v.* MCLAUGHLIN, COLLECTOR OF INTERNAL REVENUE. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Morgan J. Doyle* for petitioner. *Solicitor General Thacher, Assistant Attorney General*

Youngquist, and *Messrs. Sewall Key, Hayner D. Larson, Paul D. Miller,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 59 F. (2d) 158.

No. 309. TWIN FALLS CANAL CO. *v.* AMERICAN FALLS RESERVOIR DISTRICT No. 2. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James R. Bothwell* for petitioner. No appearance for respondent. Reported below: 59 F. (2d) 19.

No. 310. MOBILE & OHIO R. Co. *v.* BROCK, ADMINISTRATRIX. October 17, 1932. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Charles B. Williams* and *Carl Fox* for petitioner. *Mr. John S. Marsalek* for respondent. Reported below: 51 S. W. (2d) 100.

No. 311. LEIBY, ADMINISTRATRIX, *v.* PENNSYLVANIA R. Co. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. E. J. McCrossin* and *Charles Dickerman Williams* for petitioner. *Mr. Roscoe H. Hupper* for respondent. Reported below: 58 F. (2d) 970.

No. 312. DONNELLY *v.* NORTHWESTERN LIFE INSURANCE Co. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William J. Berne* for petitioner. *Mr. W. T. Henry* for respondent. Reported below: 59 F. (2d) 46.

No. 313. MISSOURI PACIFIC R. Co. *v.* WHELEN SPRINGS GRAVEL Co. ET AL. October 17, 1932. Petition for writ

of certiorari to the Supreme Court of Arkansas denied. *Messrs. Robert E. Wiley* and *Edward J. White* for petitioner. *Messrs. George B. Rose, D. H. Cantrell, J. F. Loughborough, Nicholas J. Gantt, Jr., G. W. Dobyns,* and *A. F. House* for respondents. Reported below: 185 Ark. 669; 49 S. W. (2d) 374.

Nos. 320 and 321. FIDELITY & DEPOSIT CO. *v.* UNITED STATES. October 17, 1932. Petition for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. George E. Hamilton, John J. Hamilton, George E. Hamilton, Jr., Henry R. Gower,* and *Washington Bowie, Jr.,* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, Marcus Borchardt,* and *Erwin N. Griswold* for the United States. Reported below: 61 App. D. C. 206; 59 F. (2d) 881.

No. 323. SPEAKMAN, TRUSTEE, *v.* BERNSTEIN ET AL., EXECUTORS. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Allen McReynolds* for petitioner. *Mr. Robert A. Hunter* for respondents. Reported below: 59 F. (2d) 520.

No. 325. CLARION RIVER POWER CO. *v.* SMITH ET AL. October 17, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Robert F. Cogswell, Wm. Marshall Bullitt,* and *C. Edward Paxson* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson,* and *Mr. Erwin N. Griswold* for respondents. Reported below: 61 App. D. C. 186; 59 F. (2d) 861.

No. 327. CHICAGO, ROCK ISLAND & PACIFIC RY. CO. *v.* MATTHEWS. October 17, 1932. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Mr. Thomas S. Buzbee* for petitioner. *Messrs. Tom J. Terral* and *Elbert E. Godwin* for respondent. Reported below: 185 Ark. 724; 49 S. W. (2d) 392.

No. 328. HAMMOND *v.* SITTEL, U. S. MARSHAL. October 17, 1932. Petition for writ of certiorari to the Circuit of Appeals for the Ninth Circuit denied. *Mr. George B. Webster* for petitioner. *Messrs. Aloysius I. McCormick* and *Samuel W. McNabb* for respondent. Reported below: 59 F. (2d) 683.

No. 334. COLSTON *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 17, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. George E. H. Goodner, Jerry A. Mathews,* and *Josephus C. Trimble* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, John H. McEvers, Carlton Fox,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 61 App. D. C. 192; 59 F. (2d) 867.

No. 336. SILVERMAN *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. William H. Lewis* for petitioner. *Solicitor General Thacher* and *Messrs. Harry S. Ridgely* and *Paul D. Miller* for the United States. Reported below: 59 F. (2d) 636.

No. 337. HURSH ET AL. *v.* KILLITS, U. S. DISTRICT JUDGE. October 17, 1932. Petition for writ of certiorari

to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Herman L. Arterberry* for petitioners. *Solicitor General Thacher* and *Messrs. Neil Burkinshaw, Paul D. Miller,* and *Erwin N. Griswold* for respondent. Reported below: 58 F. (2d) 903.

No. 339. CHICAGO GREAT WESTERN R. Co. *v.* PUBLIC SERVICE COMMISSION ET AL. October 17, 1932. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Roy B. Thomson* and *Arthur Mag* for petitioner. No appearance for respondents. Reported below: 51 S. W. (2d) 73.

No. 340. KEUSCH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Arthur B. Hyman* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch, John MacC. Hudson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 60 F. (2d) 481.

No. 342. RIEKER BREWING Co. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Maurice J. Speiser* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller* and *Mahlon D. Kiefer* for the United States. Reported below: 60 F. (2d) 88.

No. 343. BISTOR ET AL. *v.* MCDONOUGH, COUNTY TREASURER. October 17, 1932. Petition for writ of certiorari

to the Supreme Court of Illinois denied. *Messrs. James M. Beck, Ferre C. Watkins, Perry J. Ten Hoor* for petitioners. *Messrs. J. Kent Greene, Oscar E. Carlstrom,* and *W. H. Sexton* for respondent. Reported below: 348 Ill. 624; 181 N. E. 417.

No. 345. Berlin *v.* Commissioner of Internal Revenue. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Abraham S. Gilbert* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, John H. McEvers,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 59 F. (2d) 996.

No. 352. Fruit Growers Express Co. *v.* Plate Ice Co. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. W. G. Brantley, W. G. Brantley, Jr.,* and *Carl H. Richmond* for petitioner. No appearance for respondent. Reported below: 59 F. (2d) 605.

No. 355. Radio Corporation *v.* Hazeltine Corp. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Stephen H. Philbin* and *Charles Neave* for petitioner. *Messrs. Wm. H. Davis* and *R. Morton Adams* for respondent. Reported below: 59 F. (2d) 203.

No. 370. United Fruit Co. *v.* Gerradiu. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Roscoe H.*

Hupper for petitioner. *Mr. Benjamin Bernstein* for respondent. Reported below: 60 F. (2d) 927.

No. 307. MT. VERNON, ALEXANDRIA & WASHINGTON RY. CO. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. F. E. Scott* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Whitney North Seymour* for the United States. Reported below: 75 Ct. Cls. 704.

No. 324. ARKALIAN *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Denver S. Church* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Leslie E. Salter, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 59 F. (2d) 175.

No. 329. HESKETT ET AL. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Will R. King* for petitioners. *Solicitor General Thacher* and *Messrs. Paul D. Miller, Harry S. Ridgely,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 58 F. (2d) 897.

No. 333. CHICKASAW NATION *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Melvin Cornish* and *Wm. H. Fuller* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, George T. Stormont, Charles H. Small,* and

Bradley B. Gilman for the United States. Reported below: 75 Ct. Cls. 426.

No. 341. PARKER *v.* SINCLAIR. October 17, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Chester I. Long, J. D. Houston, Peter Q. Nyce, Samuel W. McIntosh,* and *Dudley W. Strickland* for petitioner. *Messrs. G. T. Stanford, R. W. Ragland, Challen B. Ellis,* and *Phil P. Campbell* for respondent. Reported below: 61 App. D. C. 219; 59 F. (2d) 1033.

No. 344. HOWARD SHEEP CO. *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Blaine B. Shimmel* and *Camden R. McAtee* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour* and *Bradley B. Gilman* for the United States. Reported below: 74 Ct. Cls. 276; 56 F. (2d) 474.

No. 347. KANSAS CITY BRIDGE CO. *v.* ALABAMA STATE BRIDGE CORP. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Samuel W. Sawyer* for petitioner. *Mr. Thomas E. Knight, Jr.,* for respondent. Reported below: 59 F. (2d) 48.

No. 348. KELLY *v.* TEXAS & PACIFIC RY. CO. October 17, 1932. Petition for writ of certiorari to the Supreme Court of Texas denied. *Mr. S. P. Jones* for petitioner. No appearance for respondent. Reported below: 51 S. W. (2d) 299.

No. 350. CONTINENTAL LEATHER CO. *v.* LAMPORT & HOLT, LTD. October 17, 1932. Petition for writ of certi-

orari to the Supreme Court of New York denied. *Mr. Neil P. Cullom* for petitioner. *Mr. G. Noyes Slayton* for respondent. Reported below: 234 App. Div. 386, 255 N. Y. S. 4; 255 N. Y. S. 896; 259 N. Y. 621, 182 N. E. 207.

No. 354. ROSENBERG *v.* UNITED STATES. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. A. E. Hurshman* and *Everett Kent* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 475.

No. 358. PHOENIX INSURANCE CO. ET AL. *v.* NEW YORK & HARLEM R. CO. ET AL. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Wm. N. Cohen, John S. Sheppard,* and *Garrard Glenn* for petitioners. *Messrs. Jacob Aronson* and *Roy C. Gasser* for respondents. Reported below: 59 F. (2d) 962.

No. 361. DAVIS *v.* NORTH CAROLINA. October 17, 1932. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Mr. Robert R. Williams* for petitioner. *Mr. Dennis G. Brummitt* for respondent. Reported below: 203 N. C. 47; 164 S. E. 732.

No. 365. PARK, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George M. Morris* and *Frederick L. Pearce* for petitioner. *Solicitor General Thacher, As-*

sistant Attorney General Youngquist, and *Messrs. Whitney North Seymour, Sewall Key,* and *Francis H. Horan* for respondent. Reported below: 58 F. (2d) 965.

No. 366. Island Petroleum Co. *v.* Commissioner of Internal Revenue. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Paul F. Myers, John R. Yates,* and *J. Kemp Bartlett* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Morton K. Rothschild* for respondent. Reported below: 57 F. (2d) 992.

No. 367. Dietrich *v.* U. S. Shipping Board Merchant Fleet Corp. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Neil P. Cullom* for petitioner. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour, J. Frank Staley,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 59 F. (2d) 202.

No. 368. Chesapeake & Ohio Ry. Co. *v.* Wood, Administratrix. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. James P. Wood* and *David H. Leake* for petitioner. *Mr. R. B. Newcomb* for respondent. Reported below: 59 F. (2d) 1017.

No. 369. Cotton, Trustee in Bankruptcy, *v.* Bennett. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied.

Messrs. Clyde B. Johnson and *Howard D. Matthews* for petitioner. *Mr. John C. Palmer, Jr.*, for respondent. Reported below: 59 F. (2d) 373.

No. 373. ATLANTIC LIFE INSURANCE CO. *v.* PHARR. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Andrew D. Christain* for petitioner. *Messrs. Lovick P. Miles, Roane Waring,* and *Sam P. Walker* for respondent. Reported below: 59 F. (2d) 1024.

No. 376. UNTERMYER *v.* COMMISSIONER OF INTERNAL REVENUE. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Wm. J. Donovan* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Norman D. Keller* for respondent. Reported below: 59 F. (2d) 1004.

No. 380. PENNSYLVANIA R. Co. *v.* ALPINE FORWARDING Co. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roscoe H. Hupper* and *Frederic D. McKenney* for petitioner. *Mr. William F. Purdy* for respondent. Reported below: 60 F. (2d) 734.

No. 381. WYER *v.* U. S. FIDELITY & GUARANTY Co. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. E. C. Fitzgerald* and *Wm. M. Thomas* for petitioner. *Mr. Ray McNaughton* for respondent. Reported below: 60 F. (2d) 856.

No. 384. SIMONS ET AL., EXECUTORS, *v.* NEW YORK LIFE INSURANCE CO. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. W. B. Grant* for petitioners. *Mr. F. H. Nash* for respondent. Reported below: 60 F. (2d) 30.

No. 389. HUNTINGTON NATIONAL BANK ET AL. *v.* HOENIG, COUNTY TREASURER. October 17, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John Welk Peck* for petitioners. *Messrs. Robert J. Odell, Clarence D. Laylin,* and *Donald J. Hoskin* for respondent. Reported below: 59 F. (2d) 479.

No. 396. DUBILIER CONDENSER CORP. ET AL. *v.* RADIO CORPORATION. October 24, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied because of failure to file the petition within the time prescribed by the statute. *Mr. Clifton V. Edwards* for petitioners. *Mr. Charles Neave* for respondent. Reported below: 59 F. (2d) 305.

No. 332. MCDONNELL ET AL. *v.* UNITED STATES. October 24, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. Robert Ash* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, H. Brian Holland,* and *Erwin N. Griswold* for the United States. Reported below: 75 Ct. Cls. 175; 59 F. (2d) 295.

No. 338. CURTISS ET AL. *v.* UNITED STATES. October 24, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Melville Church, William H.*

White, Jr., and *C. P. Des Jardine* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg*, and *Messrs. Whitney North Seymour, Henry C. Workman*, and *Bradley B. Gilman* for the United States. Reported below: 75 Ct. Cls. 286.

No. 362. DAVIS ET AL. *v.* NORTH CAROLINA. October 24, 1932. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Messrs. Robert R. Williams, Albert L. Cox*, and *Clyde R. Hoey* for petitioners. *Mr. Dennis G. Brummitt* for respondent. Reported below: 203 N. C. 13; 164 S. E. 737.

No. 372. GOETZ *v.* UNITED STATES. October 24, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Daniel M. Dever* for petitioner. *Solicitor General Thacher* and *Messrs. Paul D. Miller, Harry S. Ridgely*, and *Erwin N. Griswold* for the United States. Reported below: 59 F. (2d) 511.

No. 383. REDERI ET AL. *v.* WILLIAM WRIGLEY, JR., & CO. ET AL. October 24, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John D. Grace* for petitioners. *Messrs. T. Catesby Jones* and *Henry P. Dart, Jr.*, for respondents. Reported below: 58 F. (2d) 916.

No. 385. FRISCHER & CO., INC., ET AL. *v.* ELTING. October 24, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Meyer Kraushaar* for petitioners. *Solicitor General Thacher, Assistant Attorney General St. Lewis*, and

Messrs. Whitney North Seymour and *Clinton M. Hester* for respondent. Reported below: 60 F. (2d) 711.

No. 392. McGovern *v.* United States. October 24, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Daniel F. Cohalan, John W. Davis, Harry S. Bandler,* and *David V. Cahill* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. John H. McEvers, J. P. Jackson, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 880.

No. 397. Dubilier Condenser Corp. et al. *v.* Radio Corporation. October 24, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Clifton V. Edwards* for petitioners. *Mr. Charles Neave* for respondent. Reported below: 59 F. (2d) 309.

No. 398. Reeves Brothers Co. *v.* Routzahn, Collector of Internal Revenue. October 24, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John E. Hughes* and *William Cogger* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *John MacC. Hudson* for respondent. Reported below: 59 F. (2d) 915.

No. 399. Gann *v.* Commissioner of Internal Revenue. October 24, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Morris Townley* for petitioner. *Solicitor Gen-*

eral Thacher, Assistant Attorney General Youngquist, and *Messrs. Whitney North Seymour, Sewall Key;* and *Hayner N. Larson* for respondent. Reported below: 61 F. (2d) 201.

No. 408. KELLY-SPRINGFIELD TIRE CO. *v.* OVERMAN CUSHION TIRE CO., INC., ET AL. October 24, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lawrence Bristol* for petitioner. *Messrs. Robert W. Byerly, F. O. Richey,* and *B. D. Watts* for respondents. Reported below: 59 F. (2d) 998.

No. 462. HIBERNIA BANK & TRUST CO. ET AL. *v.* MAXWELL. See same case, *ante,* p. 572.

No. 254. MARTIN HOTEL CO. ET AL. *v.* UNITED STATES. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. A. C. Kennedy, John E. Hughes,* and *William Cogger* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, John MacC. Hudson,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 59 F. (2d) 549.

No. 351. DENVER ROCK DRILL MFG. CO. *v.* UNITED STATES. November 7, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. Robert Ash* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour* and *Bradley B. Gilman* for the United States. Reported below: 75 Ct. Cls. 475; 59 F. (2d) 834.

No. 386. HANRAHAN, TRUSTEE IN BANKRUPTCY, *v.* REITER. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David Haar* for petitioner. *Mr. Julius H. Reiter, pro se.* Reported below: 58 F. (2d) 631.

No. 394. YOUNG ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Theodore B. Benson, M. F. Mitchell,* and *George G. Witter* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch, John G. Remey,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 59 F. (2d) 691.

No. 403. ADAMS ET AL. *v.* UNITED STATES ET AL. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. F. E. Riddle, James A. Reed, Clarence Lohman,* and *Ralph A. Barney* for petitioners. *Solicitor General Thacher, Assistant Attorney General Richardson,* and *Messrs. Whitney North Seymour, Nat M. Lacy, Wm. H. Riley, Jr., Edward H. Chandler, James H. Maxey, Summers Hardy, William O. Beall, Alvin Richards, Hayes McCoy, Warren T. Spies,* and *Thos. J. Flannelly* for the United States et al. Reported below: 59 F. (2d) 653.

No. 404. ADAMS ET AL. *v.* OSAGE TRIBE OF INDIANS ET AL. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. R. E. Riddle, James A. Reed, Clarence Lohman,* and *Ralph A. Barney* for petitioners. *Messrs. B. W.*

Griffith, J. M. Hill, and *W. P. McGinnis* for respondents. Reported below: 59 F. (2d) 653.

No. 405. MULLENDORE ET AL. *v.* OSAGE TRIBE OF INDIANS ET AL. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. F. E. Riddle, James A. Reed, Clarence Lohman,* and *Ralph A. Barney* for petitioners. *Messrs. Edward H. Chandler, Summers Hardy, William O. Beall, James H. Maxey,* and *Alvin Richards* for respondents. Reported below: 59 F. (2d) 653.

No. 406. YARBROUGH ET AL. *v.* OSAGE TRIBE OF INDIANS ET AL. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. F. E. Riddle, James A. Reed, Clarence Lohman,* and *Ralph A. Barney* for petitioners. *Messrs. Thomas J. Flannelly, Edward H. Chandler,* and *William H. Zurck* for respondents. Reported below: 59 F. (2d) 653.

No. 259. MARYLAND CASUALTY CO. *v.* COUNTY COURT OF MORGAN COUNTY ET AL.; and

No. 409. COUNTY COURT OF MORGAN COUNTY *v.* MARYLAND CASUALTY CO. ET AL. November 7, 1932. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. William L. Rawls* and *D. H. Hill Arnold* for the Maryland Casualty Co. *Mr. Clarence E. Martin* for the County Court of Morgan County et al. Reported below: 59 F. (2d) 414.

No. 410. U. S. STEEL PRODUCTS CO. ET AL. *v.* NAVIGAZIONE LIBERA TRIESTINA SOCIETA ANONIMA ET AL.; and

No. 411. AMERICAN PRINTING INK CO. ET AL. *v.* SAME. November 7, 1932. Petition for writs of certiorari to the

Circuit Court of Appeals for the Second Circuit denied. *Mr. Forrest E. Single* for petitioners. *Mr. Roscoe H. Hupper* for respondents. Reported below: 60 F. (2d) 683.

No. 420. SIELCKEN-SCHWARZ *v.* AMERICAN FACTORS, LTD.; and

No. 421. ISENBERG *v.* SAME. November 7, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Dean Hill Stanley* and *Brainard Avery* for petitioners. *Messrs. Allen S. Hubbard, Alfred Sutro, W. H. Lawrence,* and *Eugene M. Prince* for respondent. Reported below: 60 F. (2d) 43.

No. 422. INSURANCE BUILDING CORP. *v.* LUCKENBACH STEAMSHIP CO., INC. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Robert H. Hopkins* for petitioner. *Mr. W. Parker Jones* for respondent. Reported below: 59 F. (2d) 135.

No. 425. KAISER ET AL. *v.* UNITED STATES. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George W. Peterson* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 410.

No. 353. LANE *v.* VOORHIES, ATTORNEY GENERAL OF MICHIGAN. November 7, 1932. Petition for writ of cer-

tiorari to the Supreme Court of Michigan denied. *Mr. J. W. Drummond* for petitioner. No appearance for respondent. Reported below: 259 Mich. 283; 243 N. W. 6.

No. 382. TELFER *v.* BOULTON. November 7, 1932. Petition for writ of certiorari to the Supreme Court of Idaho denied. *Messrs. W. G. Bissell* and *A. F. James* for petitioner. No appearance for respondent. Reported below: 12 P. (2d) 767.

No. 413. BURKIS ET AL. *v.* UNITED STATES. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Frederic M. P. Pearse* and *Louis Halle* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Leslie E. Salter, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 452.

No. 416. GRAY *v.* HECKE ET AL. November 7, 1932. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. John Gray, pro se. Mr. U. S. Webb* for respondents. Reported below: 123 Cal. App. 281; 11 P. (2d) 26.

No. 418. SCHOOL DISTRICT No. 22, OSAGE COUNTY, OKLAHOMA, ET AL. *v.* PRUDDEN ET AL. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Finis E. Riddle, Clarence Lohman,* and *Ralph A. Barney* for petitioners. No appearance for respondents. Reported below: 59 F. (2d) 1073.

No. 419. SHEVLIN LAND CO. ET AL. *v.* COUNTY OF BECKER, MINNESOTA. November 7, 1932. Petition for

writ of certiorari to the Supreme Court of Minnesota denied. *Mr. Mortimer H. Boutelle* for petitioners. No appearance for respondent. Reported below: 186 Minn. 401; 243 N. W. 433.

No. 427. SHORE *v.* SHELL PETROLEUM CORP. ET AL;
No. 428. MASON *v.* SAME;
No. 429. CHURCHILL ET AL. *v.* SAME; and
No. 430. WENRICH ET AL. *v.* SHELL PETROLEUM CORP. November 7, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. James M. Beck, Charles Warren,* and *F. Dumont Smith* for petitioners. *Messrs. Roland Boynton, John G. Egan, Benjamin F. Hegler, Truman Post Young,* and *P. G. McElwee* for respondents. Reported below: 60 F. (2d) 1.

No. 431. GADEK *v.* UNITED STATES. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederic M. P. Pearse* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Leslie E. Salter, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 1084.

No. 432. WARD ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Jefferson P. Chandler* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *J. P. Jackson* for respondent. Reported below: 58 F. (2d) 757.

No. 435. STROGAN *v.* UNITED STATES. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederic M. P. Pearse* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Leslie E. Salter, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 483.

No. 436. STROGAN *v.* UNITED STATES. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederic M. P. Pearse* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Leslie E. Salter, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 483.

No. 473. ABRAHAM & STRAUS, INC., *v.* ART METAL WORKS, INC. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert S. Blair* for petitioner. *Mr. Kenneth S. Neal* for respondent. Reported below: 61 F. (2d) 122.

No. 426. ARKWRIGHT ET AL. *v.* GONSER, EXECUTOR, ET AL. See same case, *post,* p. 672.

No. 433. WAGNER TUG BOAT CO. *v.* MEAGHER, ADMINISTRATRIX. On petition for writ of certiorari to the Supreme Court of Washington. November 14, 1932. The petition for writ of certiorari in this cause is denied upon the ground that the judgment sought here to be reviewed is joint and the record fails to disclose summons and

severance. *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U. S. 169; *Capital National Bank* v. *Board of Supervisors*, 286 U. S. 550; *Fidelity Union Casualty Co.* v. *Hanson, ante*, p. 599; *Louisville & Nashville R. Co.* v. *Parker, ante*, p. 569. *Messrs. Walter L. Clark, Roszel C. Thomsen*, and *Stephen V. Carey* for petitioner. *Mr. Winter S. Martin* for respondent. Reported below: 168 Wash. 253; 11 P. (2d) 245.

No. 494. PROECHEL *v.* UNITED STATES. November 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *A. E. Proechel, pro se.* No appearance for the United States. Reported below: 59 F. (2d) 648.

No. 438. HARTFORD-EMPIRE CO. *v.* NIVISON-WEISKOPF CO.;

No. 439. SAME *v.* KEARNS-GORSUCH BOTTLE CO.;

No. 440. SAME *v.* LAMB GLASS CO.; and

No. 443. LAMB GLASS CO. *v.* HARTFORD-EMPIRE CO. November 14, 1932. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. William J. Belknap, Thomas G. Haight, Clarence P. Byrnes, Vernon M. Dorsey, Robson D. Brown*, and *John P. Bartlett* for Hartford-Empire Co. *Messrs. Drury W. Cooper* and *Allen C. Bakewell* for Lamb Glass Co. *Messrs. Charles Neave* and *Stephen H. Philbin* for Kearns-Gorsuch Bottle Co. No appearance for Nivison-Weiskopf Co. Reported below: 58 F. (2d) 701.

No. 442. NATIONAL SURETY CO. *v.* TOPEKA. November 14, 1932. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Messrs. H. L. McCune* and

Henry L. Jost for petitioner. *Mr. Thomas F. Doran* for respondent. Reported below: 135 Kan. 646; 11 P. (2d) 1034.

Nos. 444 and 445. BANNING *v.* HARTMAN FURNITURE & CARPET CO.; and

Nos. 446 and 447. HARTMAN FURNITURE & CARPET CO. *v.* BANNING. November 14, 1932. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Wm. Nevarre Cromwell* for Banning. *Messrs. Clifton V. Edwards* and *George E. Mueller* for Hartman Furniture & Carpet Co. Reported below: 59 F. (2d) 129.

No. 450. MACDONALD ET AL. *v.* H. W. PETERS CO., INC. November 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Melville Church* and *Clarence B. Des Jardins* for petitioners. *Mr. Joseph B. Jacobs* for respondent. Reported below: 59 F. (2d) 974.

No. 451. GREEN ET AL. *v.* SAUERMAN ET AL. November 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John M. Zane* for petitioners. *Messrs. George A. Chritton* and *Russell Wiles* for respondents.

No. 454. KAWACZ *v.* DELAWARE, LACKAWANNA & WESTERN R. Co. November 14, 1932. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. George E. Phillies* for petitioner. *Mr. Louis L. Babcock* for respondent. Reported below: 259 N. Y. 166, 181 N. E. 87; 233 App. Div. 422, 254 N. Y. S. 270, 254 N. Y. S. 1034.

No. 401. FREEPORT TEXAS CO. ET AL. *v.* UNITED STATES. November 21, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. Paul Armitage* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, George H. Foster, Bradley B. Gilman,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 74 Ct. Cls. 478; 58 F. (2d) 473; 59 F. (2d) 1060.

No. 437. SCOTT LUMBER CO. *v.* SUBURBAN IMPROVEMENT CO. November 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Frank W. Nesbit* for petitioner. *Mr. John A. Howard* for respondent. Reported below: 59 F. (2d) 711.

No. 455. GILRUTH *v.* LUSTER ET AL;

No. 456. GILLETTE *v.* SAME; and

No. 457. HUTCHENS *v.* SAME. November 21, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Irwin T. Gilruth* for petitioners. *Mr. Frank C. Mann* for respondents. Reported below: 60 F. (2d) 751.

No. 458. U. S. ZINC CO. *v.* CENTRAL STATES POWER & LIGHT CORP. November 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Charles Earl* and *Colley W. Bell* for petitioner. *Messrs. Francis E. Matthews, Elmer J. Lundy,* and *L. M. Poe, Jr.,* for respondent. Reported below: 60 F. (2d) 832.

No. 495. DORRANCE ET AL. *v.* PENNSYLVANIA. December 5, 1932. Petition for writ of certiorari to the Supreme

Court of Pennsylvania denied upon the ground that the federal question was not properly presented to, and was not passed upon by, the Supreme Court of Pennsylvania. *Messrs. Robert von Moschzisker, Schofield Andrews,* and *Nathan L. Miller* for petitioners. *Messrs. Wm. A. Schnader* and *William A. Gray* for respondent. Reported below: 309 Pa. 115.

No. 459. California *v.* General Motors Acceptance Corp. December 5, 1932. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. U. S. Webb* for petitioner. *Mr. Wm. E. Colby* for respondent. Reported below: 216 Cal. 1.

No. 463. McCoy et al. *v.* Arkansas Natural Gas Co. December 5, 1932. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. G. P. Bullis* for petitioners. *Mr. W. H. Arnold, Jr.,* for respondent. Reported below: 175 La. 487; 143 So. 383.

No. 464. Townsend, Receiver, *v.* South Carolina Insurance Co. et al. December 5, 1932. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Messrs. Charles A. Douglas, Edmund D. Campbell, Fred D. Townsend,* and *Thomas Henry Moffatt* for petitioner. *Mr. Irvine F. Belser* for respondents.

No. 467. Schloss Bros. & Co., Inc., *v.* Monongahela National Bank et al. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George D. Wick* for petitioner. No appearance for respondents. Reported below: 60 F. (2d) 365.

Nos. 471 and 472. BLUMENTHAL *v.* COMMISSIONER OF INTERNAL REVENUE. December 5, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George M. Morris* and *Frederick L. Pearce* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *A. H. Conner* for respondent. Reported below: 60 F. (2d) 715.

No. 474. EASTERN TRANSPORTATION CO. *v.* NORTHERN BARGE CORP. ET AL. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Anthony V. Lynch, Jr.,* for petitioner. *Messrs. E. Curtis Rouse, John W. Oast, Jr.,* and *Albert T. Gould* for respondents. Reported below: 60 F. (2d) 737.

No. 484. FRICKE, ADMINISTRATOR, *v.* GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORP., LTD. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Halbert H. McCluer* for petitioner. *Messrs. Thomas Hackney* and *Leslie A. Welch* for respondent. Reported below: 59 F. (2d) 563.

No. 488. WEBBER ET AL. *v.* NEW YORK LIFE INSURANCE CO. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Julius I. Peyser* for petitioners. *Mr. F. H. Nash* for respondent. Reported below: 60 F. (2d) 22.

No. 491. HARE & CHASE, INC., *v.* NATIONAL SURETY CO. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied.

Messrs. Hartwell Cabell and *Joseph S. Clark, Sr.*, for petitioner. *Mr. Henry DeForest Baldwin* for respondent. Reported below: 60 F. (2d) 909.

No. 498. UNION INDEMNITY CO. *v.* HALL. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Clay C. Rogers* for petitioner. *Mr. A. M. Meyer* for respondent. Reported below: 61 F. (2d) 85.

No. 402. LITTMAN *v.* BRODERICK, SUPERINTENDENT OF BANKS. December 5, 1932. Petition for writ of certiorari to the Supreme Court of New York, County of New York, denied. *Mr. Abraham Feit* for petitioner. *Mr. Carl J. Austrain* for respondent. Reported below: 232 App. Div. 538, 250 N. Y. S. 546; 258 N. Y. 468, 180 N. E. 174.

No. 465. FEDERAL TRADE COMMISSION *v.* JAMES S. KIRK & CO. ET AL. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Robert E. Healy, Martin A. Morrison, Edward E. Reardon*, and *James W. Nichol* for petitioner. *Messrs. William P. Sidley* and *Frank F. Dinsmore* for respondents. Reported below: 59 F. (2d) 179.

Nos. 479 and 480. DIAMOND ALKALI CO. *v.* HEINER, COLLECTOR OF INTERNAL REVENUE. December 5, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John W. Davis, Marion N. Fisher, Wm. A. Seifert*, and *Maynard Teall* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist*, and *Messrs. Whitney*

North Seymour, Sewall Key, and *Norman D. Keller* for respondent. Reported below: 60 F. (2d) 505.

No. 483. LOTHROP ET AL. *v.* ROBERTSON. December 5, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Samuel Herrick, James A. Carr,* and *Joseph J. Gravely* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, Alexander Holtzoff,* and *Theodore A. Hostetler* for respondent. Reported below: 61 F. (2d) 404.

No. 486. LAFONTAN *v.* AMERICAN IMPORT & EXPORT CO. ET AL. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Guerra Everett* for petitioner. *Mr. J. Kemp Bartlett* for respondents. Reported below: 58 F. (2d) 180; 59 F. (2d) 204.

No. 487. BOASBERG *v.* UNITED STATES. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John D. Grace* for petitioner. *Solicitor General Thacher,* and *Messrs. Paul D. Miller, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 185.

No. 489. MCMURRAY *v.* REYNOLDS. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. N. E. Corthell* and *A. W. McCullough* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *J.*

Louis Monarch for respondent. Reported below: 60 F. (2d) 843.

No. 493. DOCHENEY *v.* PENNSYLVANIA R. Co. December 5, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. Thomas Hoffman* for petitioner. *Messrs. Frederic D. McKenney, John S. Flannery, G. Bowdoin Craighill,* and *Robert D. Dalzell* for respondent. Reported below: 60 F. (2d) 808.

No. 449. HASKELL ET AL. *v.* CALIFORNIA. See same case, *ante,* p. 576.

No. 158. FOREIGN TRANSPORT & MERCANTILE CORP. *v.* MORAN TOWING & TRANSPORTATION CO. December 12, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John C. Crawley* and *Earle Farwell* for petitioner. No appearance for respondent. Reported below: 57 F. (2d) 143.

No. 485. DILLON *v.* UNITED STATES. December 12, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas P. Cleary* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 61 F. (2d) 1025.

No. 500. BEVAN *v.* LIGHT, SHERIFF. December 12, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George D. Welles* for petitioner. *Messrs. Raymond T. Jackson, New-*

ton D. Baker, and *Harold W. Fraser* for respondent. Reported below: 61 F. (2d) 1019.

No. 501. KOEHRMAN *v.* LIGHT, SHERIFF. December 12, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George D. Welles* for petitioner. *Messrs. Raymond T. Jackson, Newton D. Baker,* and *Harold W. Fraser* for respondent. Reported below: 61 F. (2d) 1033.

No. 502. STRANAHAN *v.* LIGHT, SHERIFF. December 12, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George D. Welles* for petitioner. *Messrs. Raymond T. Jackson, Newton D. Baker,* and *Harold W. Fraser* for respondent. Reported below: 61 F. (2d) 1040.

No. 511. PURITAN PHARMACEUTICAL CO. *v.* ANSEHL. December 12, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Howard G. Cook* and *Gus O. Nations* for petitioners. *Mr. Ralph Kalish* for respondent. Reported below: 61 F. (2d) 131.

No. 468. COTTER ET AL. *v.* UNITED STATES. December 19, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Richard L. Merrick* for petitioners. *Solicitor General Thacher,* and *Messrs. Neil Burkinshaw, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 689.

No. 490. SANSOME *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. December 19, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. R. M. O'Hara* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *Francis H. Horan* for respondent. Reported below: 60 F. (2d) 931.

No. 497. WYOMING EX REL. MERRITT OIL CORP. *v.* DISTRICT COURT. December 19, 1932. Petition for writ of certiorari to the Supreme Court of Wyoming denied. *Messrs. Bolitha J. Laws, Paul B. Cromelin,* and *W. L. Walls* for petitioner. *Messrs. Roderick N. Matson* and *L. E. Armstrong* for respondent. Reported below: 44 Wyo. 437; 13 P. (2d) 568.

No. 503. SOUTHERN PACIFIC CO. *v.* UNITED STATES. December 19, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Henley C. Booth* for petitioner. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour, W. Clifton Stone,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 60 F. (2d) 864.

No. 505. BRINK *v.* UNITED STATES. December 19, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Sidney G. Stricker* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 231.

Nos. 506 and 507. LEA ET AL. *v.* NORTH CAROLINA. December 19, 1932. Petition for writs of certiorari to the Superior Court of Buncombe County and to the Supreme Court of North Carolina denied. *Messrs. L. E. Gwinn* and *Albert L. Cox* for petitioners. *Mr. Dennis G. Brummitt* for respondent. Reported below: 203 N. C. 316, 166 S. E. 292; 203 N. C. 327, 166 S. E. 297.

Nos. 508 and 509. GENERAL TUBE CO. *v.* STEEL & TUBES, INC. December 19, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. G. M. Browne* for petitioner. *Mr. Drury W. Cooper* for respondent. Reported below: 61 F. (2d) 475.

No. 510. MARQUETTE TOOL & MFG. CO. ET AL. *v.* HOOVEN, OWENS, RENTSCHLER CO. December 19, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. O. R. Barnett* and *Province M. Pogue* for petitioners. *Messrs. Greer Maréchal, Drury W. Cooper,* and *Jonathan B. Haywood* for respondent. Reported below: 61 F. (2d) 1035.

No. 512. TOPAS ET AL. *v.* NATIONAL SHAWMUT BANK OF BOSTON. December 19, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. James Garfield* and *Maurice Leon* for petitioners. *Mr. Thomas Hunt* for respondent. Reported below: 60 F. (2d) 467.

No. 520. LEHIGH & NEW ENGLAND R. CO. *v.* FINNERTY. December 19, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edward L. Katzenbach* for petitioner. *Messrs. E. Burke Finnerty* and *Charles Hershenstein* for respondent. Reported below: 61 F. (2d) 289.

No. 533. HOWARD ET AL. *v.* RANDALL & MCALLISTER ET AL. December 19, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William F. Purdy* for petitioners. *Messrs. Horace L. Cheyney* and *Albert T. Gould* for respondents. Reported below: 61 F. (2d) 889.

No. 563. REIKES *v.* LOWENSTEIN, TRUSTEE IN BANKRUPTCY. January 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. David Haar* for petitioner. No appearance for respondent. Reported below: 60 F. (2d) 933. See also 54 F. (2d) 481.

Nos. 521 and 522. BIRMINGHAM *v.* GRAVES, STATE COMMISSIONER OF EDUCATION. January 9, 1933. Petition for writs of certiorari to the Supreme Court and to the Court of Appeals of the State of New York denied. MR. JUSTICE CARDOZO took no part in the consideration or decision of this application. *Miss Agnes V. Birmingham, pro se. Mr. Henry Epstein* for respondent. Reported below: 227 App. Div. 262, 237 N. Y. S. 465; 255 N. Y. 623, 175 N. E. 341.

No. 524. MANISTIQUE & LAKE SUPERIOR R. Co. *v.* MUSGROVE, ADMINISTRATRIX. January 9, 1933. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Messrs. George H. Beckwith* and *Gustavus Ohlinger* for petitioner. No appearance for respondent. Reported below: 259 Mich. 469; 244 N. W. 132.

No. 525. BRITTON *v.* UNITED STATES. January 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John B. Boddie* for petitioner. *Solicitor General Thacher*, and *Messrs.*

Paul D. Miller, Harry S. Ridgely, and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 772.

No. 527. CHARLES BROADWAY ROUSS, INC., ET AL. *v.* FIRST NATIONAL BANK OF COLUMBUS, GA., ET AL. January 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Herman H. Swift* for petitioners. *Messrs. Thomas L. Bowden* and *Henry D. Gaggstatter* for respondents. Reported below: 61 F. (2d) 489.

Nos. 528 and 529. JAMISON ET AL. *v.* UNITED STATES ET AL. January 9, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Courtland Palmer* for petitioners. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour* and *J. Frank Staley* for the United States. Reported below: 60 F. (2d) 876.

No. 532. BERL ET AL., RECEIVERS, *v.* CRUTCHER ET AL. January 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. George Thompson, Jr., Thomas Francis Howe,* and *Hugh M. Morris* for petitioners. *Mr. S. C. Rowe* for respondents. Reported below: 60 F. (2d) 440.

No. 536. BINKLEY COAL CO. *v.* HENDERSON, TRUSTEE IN BANKRUPTCY, ET AL. January 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry Adamson* for petitioner. *Mr. John D. Welman* for respondents. Reported below: 60 F. (2d) 337.

No. 540. CHESAPEAKE & OHIO RY. CO. *v.* HOWARD, ADMINISTRATRIX. January 9, 1933. Petition for writ of certiorari to the Court of Appeals of Kentucky denied.

Mr. LeWright Browning for petitioner. *Mr. John T. Diederich* for respondent. Reported below: 244 Ky. 838; 51 S. W. (2d) 461.

No. 542. DOOLITTLE, EXECUTOR, *v.* ALLEN, COLLECTOR OF INTERNAL REVENUE. January 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. George B. Thummel* and *W. M. Morton* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Wm. C. Thompson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 60 F. (2d) 812.

No. 543. WALSH *v.* UNITED STATES;
No. 544. D'AGOSTIN *v.* SAME;
No. 545. DODARO *v.* SAME; and
No. 546. CAPRIOLA *v.* SAME. January 9, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. David D. Madden* for Walsh. *Mr. Frank R. Reid* for D'Agostin. *Mr. Harry B. North* for Dodaro and Capriola. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Leslie E. Salter* and *Paul D. Miller* for the United States. Reported below: 61 F. (2d) 5.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 3, 1932, TO AND INCLUDING JANUARY 9, 1933.

No. 299. AERO MAYFLOWER TRANSIT CO. *v.* CONWAY, SECRETARY OF STATE, ET AL. Appeal from the District Court of the United States for the Eastern District of Louisiana. October 3, 1932. Dismissed on motion of *Messrs. Wm. J. Guste, Edgar Watkins, Mac Asbill, Edgar Watkins, Jr.,* and *Edwin T. Merrick* for appellant. *Mr. Gaston L. Porterie* for appellees.

No. 349. F. C. HENDERSON, INC., *v.* RAILROAD COMMISSION OF TEXAS ET AL.. Appeal from the District Court of the United States for the Western District of Texas. October 3, 1932. Dismissed on motion of *Mr. Richard S. Doyle* for appellant. Reported below: 56 F. (2d) 218.

No. 360. HEAVNER *v.* LINCOLNTON ET AL. Appeal from the Supreme Court of North Carolina. October 3, 1932. Dismissed on motion of *Mr. Stephen B. Dolley* for appellant. Reported below: 202 N. C. 400; 162 S. E. 909.

No. 199. HAWKS ET AL. *v.* HAMILL ET AL. Appeal from the Circuit Court of Appeals for the Tenth Circuit. October 24, 1932. Dismissed with costs on motion of *Messrs. J. Berry King* and *William Chesley Lewis* for appellants. Reported below: 58 F. (2d) 41.

No. 426. ARKWRIGHT ET AL. *v.* GONSER, EXECUTOR, ET AL. November 7, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Petition dismissed for failure to comply with the rules. *Mr. John Ruffalo* for petitioners. No appearance for respondents. Reported below: 59 F. (2d) 702.

No. 481. PENNY STORES, INC., ET AL. *v.* RICE, ATTORNEY GENERAL, ET AL. Appeal from the District Court of the United States for the Southern District of Mississippi. November 14, 1932. Appeal dismissed with costs per stipulation of counsel. *Mr. Wm. H. Watkins* for appellants. *Mr. J. A. Lauderdale* for appellees. Reported below: 59 F. (2d) 789.

INDEX

ABATEMENT. See **Taxation**, I, 4.

ACCOUNTING. See **Interstate Commerce Acts**, 5.

ACTIONS. See **Admiralty**, 3–5.

ADMINISTRATIVE CONSTRUCTION. See **Statutes**, 10–12.

ADMIRALTY. See **Costs. General Average**, see **Claims.**

1. *Seamen. Statutes.* Statutes benefiting seamen should be liberally construed to effectuate policy of Congress to deal with them as favored class. *Bainbridge* v. *Merchants & Miners Transportation Co.*, 278.

2. *Id.* Section 33 of Merchant Marine Act construed liberally in aid of purpose to protect seamen and dependents. *Cortes* v. *Baltimore Insular Line*, 367.

3. *Actions. Election.* Allowing seaman election of cause of action *ex delicto* for failure of master to furnish care or cure is not inconsistent with his having cause of action *ex contractu* under general maritime law. *Id.*

4. *Id. Personal Injuries.* Failure of master to furnish care or cure to seaman stricken with pneumonia, as basis of liability under § 33 of Merchant Marine Act. *Id.*

5. *Id. Venue.* Provision of Merchant Marine Act relating to venue of actions by seamen applies only to federal courts; where action is in state court, venue determined by state law. *Bainbridge* v. *Merchants & Miners Transportation Co.*, 278.

6. *Collision. Damages. "Spare Boat."* Damages for loss of use of tugboat laid up by collision; "spare boat" doctrine; correction of assessment of damages on appeal. *Brooklyn Eastern District Terminal* v. *United States*, 170.

7. *Towage. Negligence. Exemption from Liability.* Owners of tugs assisting vessel using her own power may stipulate against liability for negligence of tugboat captain who boards vessel and acts as pilot. *Sun Oil Co.* v. *Dalzell Towing Co.*, 291.

8. *Fire. Liability.* Shipowner's liability; what constitutes "neglect"; exemption under fire statute; liability as affected by bills of lading and personal contracts; waiver of immunity. *Earle & Stoddart* v. *Ellerman's Wilson Line*, 420.

ADMIRALTY—Continued.

9. *Appeal. Trial De Novo.* 'Appeal in admiralty cases is trial *de novo*. *Brooklyn Eastern District Terminal* v. *United States*, 170.

ADVISORY OPINIONS. See **Jurisdiction**, II, 1.

AFFILIATED CORPORATIONS. See **Taxation**, III.

ALIENS. See **Constitutional Law**, I, 7; V, 5.

1. *Immigration Acts. Penalties.* Bringing inadmissible aliens; remission of fine; effect of consular visa. *Elting* v. *North German Lloyd*, 324; *Lloyd Sabaudo Societa* v. *Elting*, 329.

2. *Deportation. Limitations.* Alien returning from round-trip voyage as member of crew of American ship made new entry and lost immunity under 1917 Act. *United States ex rel. Stapf* v. *Corsi*, 129.

3. *Id.* Alien managing house of prostitution may be deported without regard to time of entry. *Costanzo* v. *Tillinghast*, 341.

4. *Findings. Review.* Findings of Secretary; conclusiveness; when determination may be set aside. *Costanzo* v. *Tillinghast*, 341; *Lloyd Sabaudo Societa* v. *Elting*, 329.

AMENDMENT. See **Statutes**, II, 11.

APPEAL. See **Admiralty**, 9; **Bills of Exceptions**; **Jurisdiction.**

APPOINTMENT OF COUNSEL. See **Constitutional Law**, VIII, (A), 15–16.

ARREST. See **Criminal Law**, 4–5.

ASSESSMENT OF BENEFITS. See *Reichelderfer* v. *Quinn*, 315.

ASSIGNMENT.

Action for Death. Implied statutory assignment under compensation act. *Aetna Life Ins. Co.* v. *Moses*, 530.

ASSIGNMENTS FOR CREDITORS. See **Bankruptcy**, 3–4.

ASSIGNMENTS OF ERROR.

1. *Necessity.* Circuit Court of Appeals may notice a plain error, though unassigned. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 474.

2. *Sufficiency.* This Court generally will disregard uncertain or deficient specifications. *Seaboard Air Line Ry. Co.* v. *Watson*, 86.

ATTORNEYS.

Authority of Court. Duty of attorney to serve when appointed by court for accused in criminal case. *Powell* v. *Alabama*, 45.

AUTOMOBILES. See **Constitutional Law**, VIII, (A), 3–5; VIII, (B), 1; **Highways.**

AVERAGE. See **Claims.**

BAILMENTS. See **Admiralty**, 7.

BANKRUPTCY. See **Jurisdiction**, I, 3.

1. *Construction of Terms.* Meaning of "include" and "creditors." *American Surety Co.* v. *Marotta*, 513.
2. *Contingent Claim.* Creditor having contingent claim is protected by Act against fraudulent conveyance. *Id.*
3. *State Laws. Assignments.* Voluntary assignments for benefit of creditors not inconsistent with Act, though subject to be set aside under it. *Pobreslo* v. *Joseph M. Boyd Co.*, 518.
4. *Id.* Statutes of Wisconsin and Texas regulating assignments for benefit of creditors, held consistent with Act. *Pobreslo* v. *Joseph M. Boyd Co.*, 518; *Johnson* v. *Star*, 527.

BILLS OF EXCEPTIONS.

Sufficiency. Matters Apparent in Record. Omission to state ground of motion for new trial, where otherwise manifested in record, not fatal. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 474.

BILLS OF LADING. See **Admiralty**, 8.

BLUE SKY LAWS. See **Montana.**

BOARD OF TAX APPEALS.

Rules of Practice. Rehearing. See *Bankers Pocahontas Coal Co.* v. *Burnet*, 308.

BONDS. See **Constitutional Law**, VIII, (A), 10; **Taxation**, I, 4.

BONUS. See **Taxation**, II, 1, 3, 6–9.

BRANDING. See **Food and Drugs Act.**

BRIDGES. See **Constitutional Law**, III, 2.

CAPITAL ASSETS. See **Taxation**, II, 3.

CARRIERS. See **Admiralty**, 7; **Constitutional Law**, III, 1; V, 2; VIII, (A), 2–5, 12; VIII, (B), 1, 3; **Federal Control**; **Interstate Commerce Acts.**

CERTIORARI. See **Jurisdiction**, II, 9.

CLAIMS.

Validity. Authorization. Contract to prepare general average statement was authorized and constituted valid claim, even if

CLAIMS—Continued.

Government not liable for general average. *Johnson & Higgins* v. *United States*, 459.

COLLISION. See **Admiralty**, 6.

COMMITMENT. See **Criminal Law**, 4–5.

CONGRESSIONAL COMMITTEES. See **Statutes**, II, 9.

CONNECTING CARRIERS. See **Interstate Commerce Acts**, 1.

CONSOLIDATED RETURNS. See **Taxation**, III.

CONSOLIDATION. See **Interstate Commerce Acts**, 2.

CONSPIRACY. See **Criminal Law**, 3.

CONSTITUTIONAL LAW. See **Admiralty**, 5; **Judgments**, 3; **Montana**; **Prohibition Act**, 1–2; **Searches**, 1–3; **Statutes**; **Zoning.**

I. In General, p. 676.
II. Full Faith and Credit Clause, p. 677.
III. Commerce Clause, p. 677.
IV. Contract Clause, p. 677.
V. Fifth Amendment, p. 677.
VI. Sixth Amendment, p. 678.
VII. Seventh Amendment, p. 678.
VIII. Fourteenth Amendment.
(A) Due Process Clause, p. 678.
(B) Equal Protection Clause, p. 680.
IX. Sixteenth Amendment, p. 680.

I. In General.

1. *Principles of Construction.* No part of Constitution may be treated as superfluous; qualification. *Powell* v. *Alabama*, 45.

2. *Id.* Guaranties of Fourth Amendment are to be liberally construed to prevent impairment of protection extended. *Grau* v. *United States*, 124; *Sgro* v. *United States*, 206.

3. *Restraint of State Officials.* Injunction to restrain governor of State from invasion of constitutional right. *Sterling* v. *Constantin*, 378.

4. *Attacking Statute.* Party challenging statute must establish the facts on which he asserts its invalidity. *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board*, 295.

5. *Id.* Validity of provision of state statute not determined, in absence of construction of it by state courts and of any attempt to enforce it against complainants. *Stephenson* v. *Binford*, 251.

6. *Delegation of Legislative Power.* Provision of Food and

CONSTITUTIONAL LAW—Continued.

Drugs Act authorizing the fixing of reasonable variations by administrative regulations, valid. *United States* v. *Shreveport Grain & Elevator Co.*, 77.

7. *Separation of Powers. Judicial Power.* Provision of Immigration Act conferring on administrative officer authority to impose money penalties for bringing aliens in violation of Act, valid. *Lloyd Sabaudo Societa* v. *Elting*, 329.

II. **Full Faith and Credit Clause.**

Application. Provision applies to proceedings of state court drawn in question in independent proceeding in federal court. *American Surety Co.* v. *Baldwin*, 156.

III. **Commerce Clause.**

1. *Powers of States. Railroads.* Statute creating rebuttable presumption of negligence against railroad, held not violation of commerce clause. *Atlantic Coast Line R. Co.* v. *Ford*, 502.

2. *Foreign Commerce. Taxation.* Whether operation of toll bridge on Canadian border was foreign commerce, exempting corporation from franchise tax on right to do business, not considered where corporation fails to show it had no power to do intrastate business. *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board*, 295.

IV. **Contract Clause.**

1. *Police Power. Highways.* Texas statute regulating use of highways by private contract carriers, though modifying or abrogating existing contracts, valid. *Stephenson* v. *Binford*, 251.

2. *Annulment by Retroaction of Rates Valid when Exacted.* See *Great Northern Ry. Co.* v. *Sunburst Oil & Rfg. Co.*, 358.

V. **Fifth Amendment.**

1. *Transfer Tax. Joint Tenancy.* Validity of transfer tax under 1924 Act as applied to joint tenancy created prior to first (1916) federal estate tax statute; effect of state law. *Gwinn* v. *Commissioner*, 224.

2. *Railroads. Regulation. Accounting Practice.* Interstate Commerce Commission order requiring railroad to carry coal-mining properties in its accounts as non-transportation property was not denial of due process. *Norfolk & Western Ry. Co.* v. *United States*, 134.

3. *Eminent Domain.* Existence of value alone does not generate interests protected against diminution. *Reichelderfer* v. *Quinn*, 315.

CONSTITUTIONAL LAW—Continued.

4. *Id.* Property of neighboring landowners not taken without just compensation by Rock Creek Park Act or statute authorizing construction of fire engine house in park. *Id.*

5. *Immigration; Procedural Regulations.* In exercise of plenary power to control admission of aliens, Congress may choose administrative rather than judicial method of imposing fines for violation of immigration laws. *Lloyd Sabaudo Societa* v. *Elting,* 329.

6. *Criminal Statutes. Definiteness.* Validity of provision of Food and Drugs Act forbidding misbranding as to quantity but allowing reasonable variations. *United States* v. *Shreveport Grain & Elevator Co.,* 77.

7. *"Due Process."* Embraces some rights, such as right to counsel in criminal case, which are specifically guaranteed elsewhere in Constitution. *Powell* v. *Alabama,* 45.

VI. **Sixth Amendment.**

Right to be Informed. Provisions of Food and Drugs Act forbidding misbranding, in respect to quantity of contents, of foods in package form, but allowing reasonable variations, held not denial of right of accused to be informed of nature and cause of accusation. *United States* v. *Shreveport Grain & Elevator Co.,* 77.

VII. **Seventh Amendment.**

Trial by Jury. Rule that plain, adequate and complete remedy at law bars suit in equity should be liberally construed to preserve right of trial by jury. *Schoenthal* v. *Irving Trust Co.,* 92.

VIII. **Fourteenth Amendment.**

(A) **Due Process Clause.**

1. *Taxation. Succession Tax.* Shifting of possession or enjoyment of trust property on grantor's death *held* subject to tax. *Guaranty Trust Co.* v. *Blodgett,* 509.

2. *Railroads. Retroactive Rates.* Annulment by retroaction of rates valid when exacted. *Great Northern Ry. Co.* v. *Sunburst Oil & Rfg. Co.,* 358.

3. *Regulation of Use of Highway.* Use of highways for purposes of gain may be prohibited or conditioned by legislature. *Stephenson* v. *Binford,* 251.

4. *Id. Private Contract Carriers.* Texas statute held not open to objection that it converts private carrier into common carrier. *Id.*

5. *Id. Rates.* Provisions of Texas statute requiring private contract carriers to obtain permit based on efficiency of existing

CONSTITUTIONAL LAW—Continued.

common carrier service, and authorizing the fixing of minimum rates not less than those prescribed for common carriers, as means of conserving highways, valid. *Id.*

6. *Regulation of Public Utilities. Rates.* Municipality as unit for rate making; valuation, what property to be included; adequacy of seven per cent. rate of return. *Wabash Valley Electric Co.* v. *Young*, 488.

7. *Right of Contract. Restrictions.* Freedom not absolute; restraints required by public safety and welfare valid. *Stephenson* v. *Binford*, 251.

8. *Id. Sales.* North Dakota statute prohibiting as contrary to public policy waiver of warranty of fitness by purchaser of harvesting and threshing machinery, valid. *Advance-Rumely Thresher Co.* v. *Jackson*, 283.

9. *Property Rights. Oil Lands.* Right of lessee of oil land to extract oil, subject to regulation by State to prevent unnecessary waste, protected by due process clause. *Sterling* v. *Constantin*, 378.

10. *Notice and Hearing.* Provision for hearing on liability under supersedeas bond by appeal after judgment, valid. *American Surety Co.* v. *Baldwin*, 156.

11. *Id.* Loss of opportunity for hearing through failure to pursue appropriate state remedy is no basis for claim of denial of due process. *Id.*

12. *Statutory Presumption. Evidence.* Statute creating rebuttable presumption of negligence against railroad upon proof of failure to give prescribed warning signals, valid. *Atlantic Coast Line R. Co.* v. *Ford*, 502.

13. *Judicial Action.* Decision of state court following earlier case though disapproving it for the future. *Great Northern Ry. Co.* v. *Sunburst Oil & Rfg. Co.*, 358.

14. *Id.* Construction of statute by state court in other cases not basis of complaint against different construction in case under review. *Atlantic Coast Line R. Co.* v. *Ford*, 502.

15. *Criminal Matters. Right to Counsel.* Right of accused, at least in capital case, to have aid of counsel, with sufficient time to advise and prepare defense, is guaranteed by due process clause. *Powell* v. *Alabama*, 45.

16. *Id.* Failure of trial court in capital case to make an effective appointment of counsel, where accused unable to make own defense or employ counsel, was denial of due process. *Id.*

17. *Id.* Right to counsel is within intendment of due process clause of Fourteenth Amendment, though its guarantee, as re-

CONSTITUTIONAL LAW—Continued.

spects Federal Government, is not left to due process clause of Fifth Amendment but is granted specifically by Sixth Amendment. *Id.*

(B) **Equal Protection Clause.**

1. *Highway Regulation. Discrimination.* Provision of Texas statute authorizing issue of special permits to carriers of certain commodities, and that relating to "shipper-owners," held not shown to have been so construed or administered as to unlawfully discriminate against complainants. *Stephenson* v. *Binford,* 251.

2. *Regulation of Sales. Classification.* North Dakota statute prohibiting waiver of warranty of fitness in sale of harvesting and threshing machinery, valid. *Advance-Rumely Thresher Co.* v. *Jackson,* 283.

3. *Statutory Presumption. Railroads.* Statute creating presumption against railroad failing to give prescribed warning signals, though not applying like rule to carriers by motor and other litigants, valid. *Seaboard Air Line Ry. Co.* v. *Watson,* 86.

IX. **Sixteenth Amendment.**

1. *Application.* Royalties received under coal leases executed prior to adoption of Amendment as taxable income. *Bankers Pocahontas Coal Co.* v. *Burnet,* 308.

CONSTRUCTION. See **Constitutional Law,** I, 1–2, 5; **Statutes,** II.

CONTINGENT CLAIM. See **Bankruptcy,** 2.

"CONTRACT" CARRIERS. See **Constitutional Law,** IV, 1; VIII, (A), 4–5; VIII, (B), 1.

CONTRACTS. See **Admiralty,** 7–8; **Claims; Constitutional Law,** IV, 1–2; VIII, (B), 7–8; **Insurance,** 1.

Public Policy. Statute prohibiting waiver of warranty of fitness in sale of harvesting and threshing machinery. *Advance-Rumely Thresher Co.* v. *Jackson,* 283.

CONTROL. See **Federal Control; Interstate Commerce Acts,** 2.

CONVENIENCE AND NECESSITY. See **Constitutional Law,** VIII, (A), 5.

CONVEYANCES. See **Fraudulent Conveyances,** 1–2.

CORPORATIONS. See **Interstate Commerce Acts,** 3–4; **Taxation,** I, 2–3; III

COSTS.

Security For. Seamen. Statute relieving seamen from giving security for fees and costs in certain actions, applies to appellate proceedings in suit under Jones Act. *Bainbridge* v. *Merchants & Miners Transportation Co.*, 278.

COUNSEL. See **Constitutional Law**, VIII, (A), 15–17; **Courts.**

COUNTERCLAIM. See **Jurisdiction**, I, 4; IV, 9.

COURTS. See **Admiralty**, 5, 9; **Constitutional Law**, I, 5, 7; II; V, 5; VII; VIII, (A), 10–11, 13–16; **Jurisdiction.**

Appointment of Counsel. Duty of court to appoint counsel for accused in criminal case. *Powell* v. *Alabama*, 45.

CREDITORS. See **Bankruptcy**, 1–4; **Fraudulent Conveyances**, 1–3.

CRIMINAL LAW. See **Constitutional Law**, V, 6; VI; VIII, (A), 15–17; **Food & Drugs Act**; **Mandamus**, 2.

1. *Right to Counsel.* Right of accused in criminal case to counsel. See *Powell* v. *Alabama*, 45.

2. *Entrapment.* Nature and grounds of defense; procedure; sufficiency of evidence. *Sorrells* v. *United States*, 435.

3. *Mann Act. Conspiracy.* Woman merely acquiescing in her transportation is not guilty of substantive offense; neither she nor male co-defendant guilty of conspiracy. *Gebardi* v. *United States*, 112.

4. *Arrest. Probable Cause.* Indictment as determining existence of probable cause for holding accused to answer. *Ex parte United States*, 241.

5. *Id.* District court has no discretion to refuse to issue bench warrant upon indictment. *Id.*

6. *Probation. Revocation.* Discretion of district judge in revoking probation held not abused. *Burns* v. *United States*, 216.

7. *Id.* Revocation of probation need not be preceded by specific charges and a formal hearing thereon. *Id.*

DAMAGES. See **Admiralty**, 6; **Verdict.**

DEATH. See **Admiralty**, 2, 4; **District of Columbia**, 1; **Workmen's Compensation Acts.**

Right of Action. Proper party plaintiff. *Aetna Life Ins. Co.* v. *Moses*, 530.

DEDICATION.

Change of Use. See *Reichelderfer* v. *Quinn*, 315.

DELEGATION OF POWER. See **Constitutional Law**, I, 6, 7.

DEPLETION. See **Taxation**, II, 6–9.

DEPORTATION. See **Aliens**, 2–3.

DISCRIMINATION. See **Constitutional Law**, VIII, (B), 1–3.

DISTRICT OF COLUMBIA. See **Constitutional Law**, V, 4; **Insurance**, 1; **Workmen's Compensation Acts.**

1. *Compensation Act. Death.* Acceptance of compensation as assignment of cause of action for death; proper parties plaintiff. *Aetna Life Ins. Co.* v. *Moses*, 530.

2. *Rock Creek Park Act.* Neighboring landowners without right to enjoin construction of fire engine house in park. *Reichelderfer v. Quinn*, 315.

3. *Zoning Regulations.* Not contracts; may be modified by Congress. *Id.*

DIVISIONS. See **Interstate Commerce Acts**, 1.

"DUE PROCESS." See **Constitutional Law**, V; VIII, (A).

EASEMENTS.

See *Reichelderfer* v. *Quinn*, 315.

ELECTION OF REMEDIES. See **Admiralty**, 3.

ELECTIONS.

Reapportionment Act. Districts. Requirements of Act of 1911 that districts be contiguous, compact and of equal populations, held not applicable to districts created pursuant to Act of 1929. *Wood* v. *Broom*, 1.

EMINENT DOMAIN. See **Constitutional Law**, V, 3–4.

ENTRAPMENT.

Nature and Grounds of Defense. See *Sorrells* v. *United States*, 435.

EQUITY. See **Jurisdiction**, I, 1–4; IV, 2.

1. *Adequate Remedy at Law.* Rule should be liberally construed to preserve right of trial by jury. *Schoenthal* v. *Irving Trust Co.*, 92.

2. *Transfer to Law Side. Rule 22.* Right to transfer determined by facts stated in bill; right *held* not waived. *Id.*

ESPIONAGE ACT. See **Searches**, 2–3.

EVIDENCE. See **Constitutional Law**, VIII, (A), 12; **Criminal Law**, 2; **Searches**, 2–3.

EXCEPTIONS. See **Bills of Exceptions.**

EXCESS PROFITS TAX. See **Taxation**, III.

FEDERAL CONTROL.

Guaranty Period. Recovery of Payment. Payment made to railroad in amount certified by Commission as definitely ascertained to be due held not recoverable; finality and validity of certificate. *United States* v. *Great Northern Ry. Co.*, 144.

FINES. See **Aliens**, 1.

FIRE ENGINE HOUSE.

Injunction Against Construction. See *Reichelderfer* v. *Quinn*, 315.

FIRES. See **Admiralty**, 8.

FOOD AND DRUGS ACT. See **Constitutional Law**, V, 6; VI; **Statutes**, I, 3.

Misbranding as Offense. See *United States* v. *Shreveport Grain & Elevator Co.*, 77.

FOREIGN COMMERCE. See **Constitutional Law**, III, 2.

FRAUDULENT CONVEYANCES. See **Bankruptcy**, 2; **Pennsylvania.**

1. *Intent of Grantor.* Conveyance to delay creditors, though without intent to defraud, voidable. *Shapiro* v. *Wilgus*, 348.

2. *Id.* Conveyance to corporation and ensuing receivership held fraudulent in law. *Id.*

3. *Remedies.* Judgment creditor held entitled to payment out of assets or to execution. *Id.*

FULL FAITH AND CREDIT. See **Constitutional Law**, II.

GENERAL AVERAGE. See **Claims.**

GOVERNOR. See **Constitutional Law**, I, 3; **Jurisdiction**, IV, 1–2; **Parties**, 1.

HARTER ACT.

See *Earle & Stoddart* v. *Ellerman's Wilson Line*, 420.

HIGHWAYS. See **Constitutional Law**, IV, 1; VIII, (A), 3–5; VIII, (B), 1.

1. *Regulation of Use.* Legislature may prohibit or impose conditions upon use of highways for purposes of gain. *Stephenson* v. *Binford*, 251.

2. *Title.* Highways are public property. *Id.*

3. *Use.* Primary and preferred use of highways is for private purposes. *Id.*

IMMIGRATION ACTS. See **Aliens**, 1–4.

INCOME TAX. See **Taxation**, I, 1; II, 1–9.

INDIANA. See **Public Utilities**, 1.

INDICTMENT.

As evidence of probable cause for issuance of bench warrant. See *Ex parte United States*, 241.

INJUNCTION. See **Constitutional Law**, I, 3; VII; **Jurisdiction**, I, 2, 4; II, 5; IV, 2.

Fire Engine House. See *Reichelderfer* v. *Quinn*, 315.

INSTRUCTIONS TO JURY.

1. *Objections. Sufficiency.* Party complaining of indefiniteness should make specific objections when excepting. *Atlantic Coast Line R. Co.* v. *Ford*, 502.

2. *Id. Timeliness.* Exception taken after jury retired is too late. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 474.

INSURANCE. See **Claims; War Risk Insurance.**

1. *Actions. Defenses.* Failure of insurer to deliver copy of application with policy, D. C. Code, § 657, did not preclude defense based upon provision of policy alone. *Washington Fidelity National Ins. Co.* v. *Burton*, 97.

2. *Compensation Insurance.* Subrogation of insurer. See *Aetna Life Ins. Co.* v. *Moses*, 530.

INTERSTATE COMMERCE ACTS. See **Federal Control.**

1. *Divisions of Joint Rates.* Jurisdiction of complaint of carrier deprived by connecting carriers of agreed share of divisions. *Alton R. Co.* v. *United States*, 229.

2. *Acquisition of Control. Lease.* Power of Commission in respect to acquisition of control of one carrier by another; extent of control, short of "consolidation," allowable; meaning of "public interest"; effect of state laws; conditions on lease. *New York Central Securities Corp.* v. *United States*, 12.

3. *Id. Corporate Powers of Carriers.* Questions concerning can not be raised in a suit to set Commission's permissive order aside. *Id.*

4. *Securities. Assumption of Liability.* Requirement that assumption be for "lawful object" refers not to limitations under state laws but to general field of corporate purposes; validity of order permitting assumption as affected by state law. *Id.*

5. *Accounting Practice of Carriers.* Order requiring railroad to carry coal-mining properties in its accounts as non-transportation property, valid. *Norfolk & Western Ry. Co.* v. *United States*, 134.

INTERSTATE COMMERCE ACTS—Continued.

6. *Orders. Review.* Order as "negative"; scope of judicial review. *Alton R. Co.* v. *United States*, 229.

7. *Mandamus to Commission. Valuation.* Duty of Commission under § 19a to value trackage and terminal rights specifically, held not so clear as to be enforceable by mandamus. *Interstate Commerce Comm'n* v. *New York, N. H. & H. R. Co.*, 178.

8. *Id.* Public policy forbids hampering valuation work of Commission by mandamus, except where departure from statute is clear. *Id.*

JOINT RATES. See **Interstate Commerce Acts**, 1.

JOINT TENANCY. See **Constitutional Law**, V, 1; **Taxation**, IV.

JONES ACT. See *Bainbridge* v. *Merchants & Miners Transportation Co.*, 278; *Cortes* v. *Baltimore Insular Line*, 367.

JUDGMENTS.

1. *Conclusiveness.* Principles of *res judicata* apply to question of jurisdiction, though question was decided in proceeding begun by motion. *American Surety Co.* v. *Baldwin*, 156.

2. *Id. Identity of Parties. Taxes.* Judgment against Collector of Internal Revenue was not *res judicata* against Commissioner or United States in litigation involving later taxes. *Bankers Pocahontas Coal Co.* v. *Burnet*, 308.

3. *Id. State and Federal Courts.* Federal remedy barred by pursuing adequate remedy to final judgment in state court. *American Surety Co.* v. *Baldwin*, 156.

JURISDICTION. See **Assignments of Error; Interstate Commerce Acts**, 1; **Judgments**, 1.

I. In General, p. 686.
II. Jurisdiction of this Court, p. 686.
III. Jurisdiction of Circuit Courts of Appeals, p. 687.
IV. Jurisdiction of District Courts, p. 688.
V. Jurisdiction of State Courts, p. 688.

References to particular subjects under this title:
Admiralty, III, 1.
Appeal, I, 4; II, 5.
Appearance, V.
Assignments of Error, II, 2.
Board of Tax Appeals, III, 3.
Certiorari, II, 9.
Counterclaim, I, 4; IV, 9.
Dismissal, I, 2.

JURISDICTION—Continued.

References to particular subjects under this title—Continued.

Equity, I, 2.
Federal Question, II, 2–4, 10; IV, 3–4.
Governor, I, 1.
Injunction, I, 4; II, 5; IV, 2.
Interstate Commerce Comm'n, IV, 5–8.
Legal Remedy, I, 2–3.
Mandamus, II, 6.
Moot Case, II, 1.
New Trial, II, 8; III, 2.
Notice, V.
Patents, IV, 9.
Rehearing, II, 3–4.
Remanding, II, 15; III, 3.
Scope of Review, II, 7–10.
State, I, 1; IV, 1.
State Courts, II, 10; V.
Venue, I, 5; IV, 9.

I. **In General.**

1. *Governor of State.* Amenable to process of federal court when, under color of state authority, he invades rights secured by Federal Constitution. *Sterling* v. *Constantin*, 378.

2. *Equity. Adequacy of Legal Remedy.* Dismissal of bill to restrain collection of state tax when allegations raise doubt as to certainty and efficacy of legal remedy, was error. *Stewart Dry Goods Co.* v. *Lewis*, 9.

3. *Id. Adequate Remedy at Law.* Suit by trustee in bankruptcy to recover preferential payments of definite amounts should be tried at law. *Schoenthal* v. *Irving Trust Co.*, 92.

4. *Interlocutory Orders. Appeal.* Appeal from order dismissing, for want of jurisdiction, counterclaim praying injunction. *General Electric Co.* v. *Marvel Rare Metals Co.*, 430.

5. *Venue.* Provision of Merchant Marine Act (§ 33) relating to jurisdiction (meaning venue) applies only to federal courts; where action is in state court, venue determined by state law. *Bainbridge* v. *Merchants & Miners Transportation Co.*, 278.

II. **Jurisdiction of this Court.**

1. *Moot Case.* Whether controversy would be justiciable and plaintiff entitled to equitable relief if Act, which Court holds no longer in force, were effective, need not be considered. *Wood* v. *Broom*, 1.

JURISDICTION—Continued.

2. *Federal Question. Necessity.* Where no federal question presented by assignments of error on appeal from state court, cause will be dismissed. *Seaboard Air Line Ry. Co.* v. *Watson,* 86.

3. *Id. Timeliness.* Federal question presented for first time on petition for rehearing in state court, though urged previously as question of state law, *held* not seasonably asserted. *American Surety Co.* v. *Baldwin,* 156.

4. *Id.* Federal claim raised first on petition for rehearing in state court is in time if it arose unexpectedly from grounds of state court's decision. *Great Northern Ry. Co.* v. *Sunburst Oil & Rfg. Co.,* 358.

5. *Injunction Appeals.* Where appeals are taken from both interlocutory and final decrees of injunction, the former will be dismissed. *Sterling* v. *Constantin,* 378.

6. *Mandamus.* Power of this Court to issue writ to District Court though Circuit Court of Appeals has direct appellate jurisdiction. *Ex parte United States,* 241.

7. *Scope of Review.* Court will not determine points not raised or considered below. *Burnet* v. *Commonwealth Improvement Co.,* 415.

8. *Id.* Grant or denial by lower court of motion for new trial for error of fact. *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 474.

9. *Id. Certiorari.* Only so much of judgment as was adverse to petitioner is reviewable. *Lloyd Sabaudo Societa* v. *Elting,* 329.

10. *Id. State Courts.* Construction of state statute by state court binding on this Court when no federal question involved; generally, state court's explicit holding as to basis of its decision accepted here. *Guaranty Trust Co.* v. *Blodgett,* 509.

11. *Remanding.* Where Circuit Court of Appeals disposed of case upon erroneous construction of statute, without deciding other questions presented, cause remanded. *American Surety Co.* v. *Marotta,* 513.

III. **Jurisdiction of Circuit Courts of Appeals.**

1. *In Admiralty.* Appeal is trial *de novo. Brooklyn Eastern District Terminal* v. *United States,* 170.

2. *Orders of District Court. New Trial.* Review of order granting or denying new trial for error of fact. *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 474.

3. *Remanding. Discretion.* Circuit Court of Appeals held not to have abused discretion in not remanding case to Board of Tax Appeals. *Murphy Oil Co.* v. *Burnet,* 299.

JURISDICTION—Continued.

IV. **Jurisdiction of District Courts.**

1. *Governor of State.* Amenable to process of federal court. *Sterling* v. *Constantin*, 378.

2. *Injunction. When Appropriate Remedy.* Governor's proclamation of "martial law" *held* not based on exigency justifying interference with private rights, and injunction restraining such interference was proper. *Id.*

3. *Federal Question.* Jurisdiction on this ground determined by allegations of bill. *Mosher* v. *Phoenix*, 29.

4. *Id. Substantial.* Allegations that city, acting under color of state authority, was violating federal right, presented substantial federal question. *Id.*

5. *Orders of Interstate Commerce Commission. Review.* Jurisdiction to review part of order denying relief in suit to establish reasonable divisions of joint rates; "negative" order; scope of review. *Alton R. Co.* v. *United States*, 229.

6. *Id.* Part of I. C. C. order which Commission has indicated willingness to reopen will not be set aside. *Norfolk & Western Ry. Co.* v. *United States*, 134.

7. *Id.* Questions whether lease of one railroad by another exceeds powers of carriers under state law or involves breach of fiduciary duty owed by majority to minority stockholders need not be considered by Commission and are not open in suit to set aside its permissive order. *New York Central Securities Corp.* v. *United States*, 12.

8. *Id.* Order permitting lease will not be set aside on account of questions concerning adequacy of rentals, when parties were fully heard and order is not shown to have confiscatory effect or to be unsupported by evidence. *Id.*

9. *Patent Infringement. Counterclaim.* Jud. Code, § 48, relates to venue and does not apply to counterclaim. *General Electric Co.* v. *Marvel Rare Metals Co.*, 430.

V. **Jurisdiction of State Courts.**

Notice and Hearing. State court, on appeal from order on motion to vacate, made on general appearance, could determine whether trial court had jurisdiction. *American Surety Co.* v. *Baldwin*, 156.

JURY. See **Instructions to Jury; Constitutional Law**, VII.

LEASE. See **Interstate Commerce Acts**, 2; **Taxation**, II, 1–3, 6–8.

LEGISLATIVE HISTORY. See **Statutes**, 8.

LIMITATION OF LIABILITY. See **Admiralty**, 7–8.

LIMITATIONS. See **Aliens**, 2–3; **Taxation**, I, 4.

LONGSHOREMEN'S ACT. See **Workmen's Compensation Acts.**

MACHINERY. See **Constitutional Law**, VIII, (A), 8; **Sales.**

MANDAMUS. See **Interstate Commerce Acts**, 7–8; **Jurisdiction**, II, 10.

1. *When Proper Remedy.* Writ will not issue to compel act as statutory duty if existence of duty is uncertain. *Interstate Commerce Comm'n* v. *New York, N. H. & H. R. Co.*, 178.

2. *To District Court.* Compelling issuance of bench warrant upon indictment. *Ex parte United States*, 241.

MANN ACT. See **Criminal Law**, 3.

MARITIME LAW. See **Admiralty.**

MARTIAL LAW. See **Jurisdiction**, IV, 2.

Power of Governor as to. See *Sterling* v. *Constantin*, 378.

MASTER AND SERVANT. See **Admiralty**, 3–4.

MERCHANT MARINE ACT. See **Admiralty**, 1–5.

MINERAL LANDS. See **Taxation**, II, 1–3, 6–8.

MISBRANDING.

As offense under Food and Drugs Act. See *United States* v. *Shreveport Grain & Elevator Co.*, 77.

MISTAKE. See *United States* v. *Great Northern Ry. Co.*, 144.

MONTANA.

Separation of Powers. Art. IV, § 1, of state constitution does not preclude exercise by state district courts of administrative powers under Blue Sky Law. *Porter* v. *Investors Syndicate*, 346.

MOOT QUESTIONS. See **Jurisdiction**, II, 1.

MOTOR VEHICLES. See **Constitutional Law**, IV, 1; VIII, (A), 3–5; VIII, (B), 1; **Highways.**

NEGLIGENCE. See **Admiralty**, 4; **Constitutional Law**, III, 1; VIII, (A), 12; VIII, (B), 3.

NEW TRIAL. See **Verdict.**

Refusal to grant new trial discretionary. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 474.

NORTH DAKOTA. See **Constitutional Law**, VIII, (A), 8; VIII, (B), 2.

NOTICE AND HEARING. See **Constitutional Law**, VIII, (A), 10–11.

OIL AND GAS. See **Constitutional Law**, VIII, (A), 9; **Taxation**, II, 1, 3, 6–9.

PARKS. See **Constitutional Law**, V, 4; **District of Columbia**, 2.

PARTIES. See **Judgments**, 2; **Workmen's Compensation Acts.**

1. *Governor.* Suit against not against State. *Sterling* v. *Constantin*, 378.

2. *Proper Plaintiff.* Effect of assignment of cause of action under compensation act. *Aetna Life Ins. Co.* v. *Moses*, 530.

PATENTS FOR INVENTIONS. See **Jurisdiction**, IV, 9.

PAYMENT BY MISTAKE. See *United States* v. *Great Northern Ry. Co.*, 144.

PENALTIES. See **Aliens**, 1; **Constitutional Law**, V, 5.

PENNSYLVANIA.

Fraudulent Conveyances. Cases not covered by Uniform Act governed by Statute of Elizabeth; conveyance made to delay creditors, though not fraudulent, illegal. *Shapiro* v. *Wilgus*, 348.

PERSONAL INJURIES. See **Admiralty**, 3–5.

PILOTAGE. See **Admiralty**, 7.

PLEADING. See **Jurisdiction**, I, 2.

PRESUMPTIONS. See **Constitutional Law**, III, 1; VIII, (A), 12; VIII, (B), 3.

Negligence. Statutory presumption against railroad. See *Atlantic Coast Line R. Co.* v. *Ford*, 503.

PRIVATE CONTRACT CARRIERS. See **Constitutional Law**, VIII, (A), 4–5.

PROBABLE CAUSE. See **Criminal Law**, 4; Searches, 3.

PROBATION. See **Criminal Law**, 6–7.

PROCEDURE. See **Admiralty**, 5–6, 9; **Aliens**, 4; **Assignments of Error**, 1–2; **Bills of Exceptions**; **Board of Tax Appeals**; **Constitutional Law**, I, 4–5; II; V, 5; VIII, (A), 10–11, 16; **Costs**; **Criminal Law**, 5, 7; **Death**; **Equity**, 2; **Instructions to Jury**, 1–2; **Insurance**, 1; **Jurisdiction**; **Mandamus**, 1–2; **New Trial**; **Parties**, 1–2; **Receivers**; **Verdict**; **Wrongful Death.**

PROCESS. See **Jurisdiction**, IV, 1.

PROHIBITION ACT. See **Searches**, 2–3.

1. *Construction.* Title II, § 25, should be construed so as to effect its purpose to preserve right to immunity from unreasonable search. *Grau* v. *United States*, 124.

2. *Search. Dwellings.* Warrant issued on affidavit stating no facts from which sale could be inferred was invalid. *Id.*

3. *Defenses.* Entrapment. See *Sorrells* v. *United States*, 435.

PROXIMATE CAUSE.

Statutory presumption against railroads. See *Atlantic Coast Line R. Co.* v. *Ford*, 502.

PUBLIC INTEREST. See **Interstate Commerce Acts**, 2; Statutes, II, 3.

PUBLIC POLICY. See **Contracts**; **Interstate Commerce Acts**, 7.

Validity and effect of legislative declaration that contract is contrary to public policy. *Advance-Rumely Thresher Co.* v. *Jackson*, 283.

PUBLIC ROADS. See **Highways.**

PUBLIC SAFETY. See **Constitutional Law**, VIII, (A), 7.

PUBLIC UTILITIES. See **Constitutional Law**, VIII, (A), 6.

1. *Rates. Unit.* Municipality rather than entire system as unit for rate making purposes under Indiana Act. *Wabash Valley Electric Co.* v. *Young*, 488.

2. *Id. Valuation.* What property to be included; allowance for financing, when cost not shown to have been incurred; rate case expenses. *Id.*

3. *Id. Rate of Return.* Favorable financial position as subsidiary company may be considered; adequacy of return; seven per cent. return held not confiscatory. *Id.*

PUBLIC WELFARE. See **Constitutional Law**, VIII, (A), 7.

PUNCTUATION. See **Statutes**, 5.

QUOTA ACT. See **Aliens**, 1.

RAILROADS. See **Constitutional Law**, III, 1; IV, 2; V, 2; VIII, (A), 2, 12; VIII, (B), 3; **Interstate Commerce Acts.**

RATES. See **Constitutional Law**, IV, 2; VIII, (A), 2, 5–6; **Public Utilities**, 1–3.

REAPPORTIONMENT. See **Elections.**

RECEIVERS. See **Fraudulent Conveyances**, 2.

Appointment. Creditor generally must exhaust legal remedy; exceptions. *Shapiro* v. *Wilgus*, 348.

REDISTRICTING. See **Elections.**

REËNACTMENT. See **Statutes**, 12.

REORGANIZATION. See **Taxation**, II, 4.

RES JUDICATA. See **Judgments**, 1–3.

ROCK CREEK PARK ACT. See **Constitutional Law**, V, 4.

Change of Use. Rights of neighboring landowners. *Reichelderfer* v. *Quinn*, 315.

ROYALTIES. See **Taxation**, II, 1–2, 6–9.

SALES. See **Constitutional Law**, VIII, (A), 8.

Warranty. Fitness. Implied warranty under Uniform Sales Act that combination harvesting and threshing machine was fit to cut and thresh purchaser's grain in single operation; statute prohibiting waiver of warranty of fitness. *Advance-Rumely Thresher Co.* v. *Jackson*, 283.

SEAMEN. See **Admiralty**, 1–5; **Costs.**

SEARCHES. See **Constitutional Law**, I, 2; **Prohibition Act**, 1–2.

1. *In General.* Provisions of the Fourth Amendment relating to search warrants should be liberally construed in favor of individual. *Sgro* v. *United States*, 206.

2. *Search Warrants.* Sufficiency of affidavit to support issuance; character of evidence required. *Grau* v. *United States*, 124.

3. *Id. Probable Cause.* Warrant can not be revived after ten days merely by redating and reissuing; issue of new warrant must be supported by proof that probable cause then exists. *Sgro* v. *United States*, 206.

SEAWORTHINESS.

Implied Warranty. Breach of as "neglect" under fire statute. *Earle & Stoddart* v. *Ellerman's Wilson Line*, 420.

SIXTEENTH AMENDMENT. See **Taxation**, II.

"SPARE BOAT" DOCTRINE. See **Admiralty**, 6.

SPECIAL ASSESSMENTS.

Public Park. What benefits intended to be assessed. *Reichelderfer* v. *Quinn*, 315.

SPECIFICATIONS OF ERROR. See **Assignments of Error.**

STARE DECISIS. See **Constitutional Law,** VIII, (A), 13.

STATE. See **Constitutional Law,** I, 3; III, 1; VIII; **Judgments,** 3; **Jurisdiction,** I, 1; V; **Parties,** 1; **Taxation,** V.

STATUTES. See **Constitutional Law; Taxation,** I, 1.

I. **Validity.**

1. *Reasonableness.* That there is conceivable relation between means and end is sufficient to sustain legislative judgment; conclusion of legislature must stand if not manifestly wrong. *Stephenson* v. *Binford,* 251.

2. *Purpose.* Statute sustained by one constitutional purpose not invalid because in another aspect it might be void. *Id.*

3. *Certainty.* Validity of provisions of Food and Drugs Act forbidding misbranding as to quantity but allowing reasonable variations. *United States* v. *Shreveport Grain & Elevator Co.,* 77.

II. **Construction.**

1. *Favoring Validity.* Statute should be construed so as to avoid doubt of validity. *United States* v. *Shreveport Grain & Elevator Co.,* 77.

2. *Id.* Court should not adopt construction of state statute that might render it of doubtful validity, in advance of determination by state court. *Stephenson* v. *Binford,* 251.

3. *Public Interest.* Statute creating private rights by restricting power of government strictly construed for protection of public interest. *Reichelderfer* v. *Quinn,* 315.

4. *Literal Meaning.* Literal construction leading to absurd results should be avoided. *Gulf States Steel Co.* v. *United States,* 32.

5. *Punctuation.* Court may disregard punctuation, or repunctuate, to ascertain natural meaning of words. *United States* v. *Shreveport Grain & Elevator Co.,* 77.

6. *Syntax.* Rules of should not be applied to defeat legislative intent. *Costanzo* v. *Tillinghast,* 341.

7. *Particular Words.* Statute must be considered in its entirety to avoid giving undue effect to. *Id.*

8. *Legislative History.* Where meaning doubtful, legislative history and statements by those in charge of bill in Congress may be considered. *United States* v. *Great Northern Ry. Co.,* 144.

9. *Id. Reports of Congressional Committees.* Will not support construction contrary to plain import of language. *United States* v. *Shreveport Grain & Elevator Co.,* 77.

STATUTES—Continued.

10. *Administrative Construction.* Contemporaneous and long continued practical construction accepted unless opposed by cogent and persuasive reasons. *Id.*

11. *Id. Failure to Amend.* Failure of Congress to amend statute creates strong presumption in favor of administrative interpretation. *Costanzo* v. *Tillinghast,* 341.

12. *Id. Effect of Reënactment.* Repeated reënactment of statute persuasive that executive regulations adopted for its enforcement were approved. *Murphy Oil Co.* v. *Burnet,* 299.

STATUTORY PRESUMPTION. See **Constitutional Law,** III, 1; VIII, (A), 12; VIII, (B), 3.

STOCKHOLDERS. See **Taxation,** I, 2–3.

SUBROGATION.

Subrogation of insurer under compensation act. See *Aetna Life Ins. Co.* v. *Moses,* 530.

SUBSIDIARY COMPANIES. See **Public Utilities,** 3.

SUCCESSION TAX. See **Constitutional Law,** VIII, (A), 1; **Taxation,** V.

SUPERSEDEAS BOND. See **Constitutional Law,** VIII, (A), 10.

SYNTAX. See **Statutes,** II, 6.

TAXATION. See **Constitutional Law,** V, 1; VIII, (A), 1; **Judgments,** 2.

I. In General, p. 694.
II. Income Tax, p. 695.
III. Excess Profits Tax, p. 695.
IV. Transfer Tax, p. 696.
V. State Taxation, p. 696.

I. **In General.**

1. *Construction of Tax Statutes.* Federal income tax statute to be construed so as to give uniform application to nation-wide scheme of taxation; effect of state laws. *Burnet* v. *Harmel,* 103.

2. *Corporation.* For tax purposes generally is entity distinct from stockholders. *Dalton* v. *Bowers,* 404.

3. *Id. Single Stockholder.* Sufficiency of facts to require disregard of corporate form. *Burnet* v. *Commonwealth Improvement Co.,* 415.

TAXATION—Continued.

4. *Liability on Bond.* In suit on bond conditioned on payment of assessment to extent it was not abated, *held* tax not "abated" by determination that collection was barred by limitations. Effect of statute enacted after execution of bond. *Gulf States Steel Co.* v. *United States,* 32.

II. **Income Tax.**

1. *What is Income.* Bonus and royalties received by lessor of mineral lands are taxable as income. *Murphy Oil Co.* v. *Burnet,* 299; *Bankers Pocahontas Coal Co.* v. *Burnet,* 308; *Strother* v. *Burnet,* 314.

2. *Id.* Royalties received by lessor under leases executed prior to Sixteenth Amendment taxable as income, though title to coal in place passed to lessee upon execution of lease. *Bankers Pocahontas Coal Co.* v. *Burnet,* 308.

3. *Id. Capital Assets.* Bonus payments to lessor held not receipts from sale of capital assets, though by state law title to oil and gas, in place, passed to lessee on execution of lease. *Burnet* v. *Harmel,* 103.

4. *Computing Income. Exchange of Property.* Tax on profits of one corporation on exchange of its property for cash and securities of another; what constitutes "reorganization." *Pinellas Ice & Cold Storage Co.* v. *Commissioner,* 462.

5. *Deductions. Losses.* Loss in corporation controlled by taxpayer as attributable to "trade or business"; offset against gain in succeeding year. *Dalton* v. *Bowers,* 404; *Burnet* v. *Clark,* 410.

6. *Id. Depletion.* Allowance applicable to bonus and royalties received by lessor. *Burnet* v. *Harmel,* 103; *Murphy Oil Co.* v. *Burnet,* 299; *Bankers Pocahontas Coal Co.* v. *Burnet,* 308.

7. *Id.* Lessor entitled to depletion allowance upon bonus and royalties, though title to minerals, in place, passed on execution of lease. *Burnet* v. *Harmel,* 103; *Bankers Pocahontas Coal Co.* v. *Burnet,* 308.

8. *Id.* Lessee-transferor stipulating for bonus or royalties retains depletable economic interest, whether by state law instrument was sublease or assignment. *Palmer* v. *Bender,* 551.

9. *Id. Computing.* Commissioner's method of allocating depletion to bonus and royalties afforded "reasonable allowance." *Murphy Oil Co.* v. *Burnet,* 299.

III. **Excess Profits Tax.**

Affiliated Corporations. Consolidated Returns. Affiliation not terminated by liquidation; deduction of losses; "intercompany" transactions. *Burnet* v. *Aluminum Goods Mfg. Co.,* 544.

TAXATION—Continued.

IV. **Transfer Tax.**

Application of 1924 Act to joint tenancy created prior to 1916 Act. *Gwinn* v. *Commissioner*, 224.

V. **State Taxation.**

Succession Tax. Incidence. See *Guaranty Trust Co.* v. *Blodgett*, 509.

TEXAS. See **Bankruptcy**, 4; **Constitutional Law**, VIII, (A), 4–5; VIII, (B), 1.

TITLE. See **Highways**, 2; **Taxation**, II, 2–3, 7.

TORTS. See **Admiralty**, 3–4.

TOWAGE. See **Admiralty**, 7.

Liability of Tug. Stipulation against liability for negligence by towage company furnishing tugs to assist vessel. *Sun Oil Co.* v. *Dalzell Towing Co.*, 291.

TRANSFER TAX. See **Constitutional Law**, V, 1; Taxation, IV.

TRANSPORTATION ACT. See **Interstate Commerce Acts.**

TRIAL. See **Instructions to Jury.**

TRIAL DE NOVO. See **Admiralty**, 9.

TRUSTS. See **Constitutional Law**, VIII, (A), 1.

UNCERTAINTY. See **Constitutional Law**, V, 6; **Statutes**, I, 3.

UNIFORMITY. See **Taxation**, I, 1.

UNITED STATES. See **Claims.**

VALUATION. See **Constitutional Law**, VIII, (A), 6; **Interstate Commerce Acts**, 7–8; **Public Utilities**, 2.

VENUE. See **Admiralty**, 5; **Jurisdiction**, I, 5.

VERDICT.

Verdict for nominal damages not necessarily inconsistent because of proof of substantial damages. See *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 474.

VETERANS. See **War Risk Insurance.**

VISA. See **Aliens**, 1.

WAIVER. See **Admiralty**, 8; **Constitutional Law**, VIII, (A), 8; VIII, (B), 2; **Equity**, 2.

WARRANTS. See **Constitutional Law**, I, 2; **Criminal Law**, 5; **Mandamus**, 2; **Prohibition Act**, 2; **Searches**, 1–3.

WARRANTY. See **Constitutional Law**, VIII, (A), 8; VIII, (B), 2; **Sales; Seaworthiness.**

WAR RISK INSURANCE.

Benefits. Converted Policy. Payment under prior policy though subsequent policy already surrendered for cash. *United States* v. *Arzner*, 470.

WASTE. See **Constitutional Law**, VIII, (A), 9.

WHITE SLAVE ACT. See **Criminal Law**, 3.

WISCONSIN. See **Bankruptcy**, 4.

WORKMEN'S COMPENSATION ACTS.

Longshoremen's Act. Death. Acceptance of compensation as assignment of cause of action against stranger for death; employer as proper party plaintiff; subrogation of insurer. *Aetna Life Ins. Co.* v. *Moses*, 530.

WRONGFUL DEATH.

Actions. Proper party plaintiff. *Aetna Life Ins. Co.* v. *Moses*, 530.

ZONING.

District of Columbia. Power of Congress in regard to zoning regulations. *Reichelderfer* v. *Quinn*, 315.

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